TRANSCRIPT OF RECORD.

20.

SUPREME COURT OF THE UNITED STATES.

No. ~~852~~ 106

FURMAN, GREEN & CO., PLAINTIFFS IN ERROR,

vs.

P. L. NICHOL, CLERK OF DAVIDSON COUNTY COURT, COLLECTOR OF TAXES, &c.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

FILED JULY 6, 1857.

SUPREME COURT OF THE UNITED STATES.

No. 252.

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vs.

P. L. NICHOL, CLERK OF DAVIDSON COUNTY COURT, COLLECTOR OF TAXES, &c.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

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Caption.

1 STATE OF TENNESSEE, *Davidson county:*

At a supreme court begun and held for the middle division of the State of Tennessee, at Nashville, at the December term, 1866, of said court, present and presiding Hon. Sam. Milligan, James O. Shackelford, and Albin Hawkins, judges of said court, the following proceedings were had upon the transcript of the record from the circuit court of Davidson county, in said State, in the case of Furman, Green & Co. *vs.* P. L. Nichol, clerk, &c., which transcript is in the words and figures following to wit:

Transcript from the circuit court.

"STATE OF TENNESSEE:

"Please at the court house in the city of Nashville, county of Davidson and State aforesaid, on the first Monday, being the third day of September, in the year of our Lord one thousand eight hundred and sixty-six, and in the ninety-first year of American independence.

"Present the Honorable Manson M. Brien, sr., one of the judges of the circuit courts of the State of Tennessee, and assigned to hold the circuit court of the ninth judicial circuit in said State.

2 *Petition.*

"To the Honorable M. M. Brien, sr., judge of the circuit court, presiding and holding the circuit court of Davidson county, Tennessee, in the city of Nashville, Francis Furman and Francis W. Green, citizens of Davidson county, Tennessee, complain of Phillip L. Nichol, clerk of the county court of said county of Davidson, having his office in said city of Nashville, and he being also a citizen of said county of Davidson, and show to your honor, that on the 1st day of August, 1866, your petitioner entered into partnership, under the firm name and style of Furman, Green & Co., as wholesale merchants in said city of Nashville, having their said business and murcantile house in said city. By reason of the formation of said partnership and before they proceeded to purchase and sell goods, wares, and murchandise in their said new firm name in said new mercantile firm your petitioners believed it to be their right and dewty to apply to the said clerk, and give bond and security, and pay said clerk's fee, and take out a licens as such wholesale merchants for the next ensuing year, as by law in such cases made and provided: Therefore, your petitioners on this the 3d day of August, 1866, applied to the said Nichol, clerk as aforesaid, at his office in Nashville, and tendered to him as such clerk a bond as required by law, which is hereto annexed, marked exhibit "A," and prayed to be taken as a part of this petition, to wit:

"We, F. Furman, F. W. Green, and R. T. Kirkpatrick, are held and firmly bound unto the State of Tennessee, in the penal
3 sum of one thousand dollars, for the use of said State, condi-

tioned that if the said Furman, Green & Co., shall, at the end of twelve months from the date hereof, render to the clerk of the county court of Davidson county in said State, a sworn statement of the invoice cost of all the goods, which they, or their assignee, shall have braught to their establishment, in said county, for sale within the said twelve months, and that they will pay the clerk the tax upon such goods, and otherwise in all things comply with the revenue laws of said State, then this obligation to be void, otherwise to remain in full force and effect, this 1st day of August, 1866."

FURMAN, GREEN & CO.
R. T. KIRKPATRICK.

Petitioners also tendered to said clerk his fee, and demanded that a licens be issued by him as such clerk to petitioners to sell goods, wares, and merchandise as wholesale merchants in said city of Nashville, for the next ensuing year, all of which said clerk this day refused to accept, receive, and perform.

Your petitioner, Francis Furman, states to your honor that he has been heretofore a wholesale licened merchant in said city of Nashville, and as such the said clerk on the 28th day of August, 1865, issued to him a wholesale yearly licens for the year next ensuing, that on this 3d day of August, 1866, petitioner appeared before said clerk at his office, and tendered to him a sworn statement of the in-
4 voice cost of all the goods which has been braught into his said mercantile establishment for sale since the date of his said license, to *to* wit, the 28th day of August, 1865, up to this date; upon said statement there are taxes due to the county of Davidson, as county tax, the sum of $883 65, which sum was tendered to said clerk in legal currency of the United States, which he refused to accept, unless petitioner Furman would also pay his State taxes in like currency.

Upon said statement there is due to the State of Tennessee from petitioner Furman, as State tax, the sum of $3,534 58; petitioner then tendered and offered to pay to said clerk the sum of $3,535 00 in the notes and issues of the bank of Tennessee, issued prior to the 6th day of May, 1861, in full payment and discharge of said sum of taxes due from him to the State of Tennessee, accrued and become due to the State since the said 28th day of August, 1865, up to this date, which sum in said notes and issues of the bank of Tennessee, the said refused to accept and receive, because the same were not at pair, and said clerk refused to accept of said bond tendered by Furman, Green & Co., and issue to them a license as aforesaid, because petitioner Furman had not paid said State tax due from him as aforesaid in par funds, and had only tendered and offered to pay the same in said notes and issue of the bank of Tennessee as aforesaid.

5 Petitioner Furman states to your honor, that he is informed and believes that in law he has the right to pay to said clerk said county tax of $883 65 in par funds or currency of the United States, and that he has also the right to pay said taxes due the State of Tennessee in the said notes and issues of the bank of Tennessee,

and that it was the duty of said clerk to accept and receive the said tenders as aforesaid, and to accept the said bond marked exhibit "A," and issue to petitioners, the said firm of Furman, Green & Co., said license demanded as aforesaid, all of which petitioners state to your honor they are informed and believe said clerk had no legal right to reject and refuse to accept and perform, and that in such action of said clerk he has not legally discharged the duties incumbent in law upon him, and that in refusing to receive said tenders he has violated the rights of petitioner Furman, and in refusing to accept of said bond and issue to Furman, Green & Co. said license, he has failed to perform his official duty, and has violated the legal rights of petitioners.

Petitioners show to the court that the bank of Tennessee was incorporated by the general assembly of the State of Tennessee by an act passed January 19th, 1838, entitled an Act to establish a State bank to raise a fund for internal improvements, and to aid in the establishment of system of education; which act of incorporation is here particularly referred to, and every section and provision therein,
and made a part of this petition, as far as may be applicable
6 to petitioners' rights, or the rights of either petition.

By the first section of said act the faith and credit of the State are pledged for the support of said bank, and to supply any deficiency in the funds specifically pledged by said act, and to give indemnity lor all losses arising from such deficiecy.

The 12th section provides that the bills or notes of said corporation originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other publick officers in all payments for taxes or other monies due to the State.

Your petitioner Furman states, and petitioners Furman, Green & Co. state, that said bank notes this day tendered to said clerk as above stated, were issued by the bank of Tennessee as provided for in said 12th section of said charter, and payable to bearer, that said corporation, the bank of Tennessee is still in existence and the charter unrepealed, and as petitioners are informed and believe that your petitioner Furman has the unquestionable legal right to pay the said sum of $3,535 00 taxes due to the State of Tennessee, in said notes and issues of the bank of Tennessee, and as the laws of the State make the said clerk the collector of the same, it was his duty to re-
ceive the same in discharge of petitioner Furman's liablitity
7 as aforesaid to the State of Tennessee, and that said clerk had no right to refuse a licenes to the firm of Furman, Green & Co. as demanded, because Furman refused to pay said State taxes in anything except said bank notes. Petitioners state that the bank of Tennessee was organized, and instituted, and issued its billes or notes under the provisions of said charter, which circulated as money and legal currency. That said charter was a contract made with the people of the State, and every person into whose possession the said notes and issues of said bank might come, that the same should be received by all collectors of taxes, and all due to the State of Ten-

nessee, and it is not in the power of the legislature of the State of Tennessee to impair or annull the validity and binding force of said contract.

Petitioners further state to your honor that by an act of the general assembly of the State of Tennessee, passed February 16th, 1866, entitled an act to wind up and settle the business of the bank of Tennessee; the said act assumes to appropriate the assets of said bank to purposes other than the payment of its debts, and redeeming its bills and issues outstanding in the hands of the holders. Said last mentioned act is refered to and made a part of this petition, as far as it may be in conflict with the rights of petitioners, or either of them.

Petitioners do not know whether the said clerk Nichol refused to receive said bank notes, tendered as aforesaid, in consequence of said act of the 16th of February, 1866, or not; but petitioners are
8 informed and believe, and so charge that said act, as far as it assumes to withdraw the capital of said bank and branches, and its assets and property from the redemption of its notes and the payments of its debts, is unconstitutional and void; that the capital and assets of said bank and branches are a trust fund, first for the benefit of its note holders, and second for its other creditors.

The premises considered, petitioners pray your honor to grant an attachment writ of mandamas, or writ nisi, directed to the said Phillip L. Nichol, clerk of the county court of said county of Davidson, returnable to the next term of the circuit court of said county of Davidson, commanding him that, unless in the meantime he receive said bank notes tendered, and bound, and issue said license, he appear on the 3d day of said term of the court, and answer said writ, and show cause, if any he can, why a peremptory writ of mandamas shall not issue against him to compell him to receive said sum of $3,535 00, the said notes of the bank of Tennessee tendered to him as aforesaid, and also issue to your petitioners, the said firm of Furman, Green & Co., a license as above demanded and described.

Petitioners also pray that the said Nichol be made a defendant to the petition, and that all necissary process issue, &c.; that upon the final hearing that a pre-emptory mandamas issue to compell the said defendant to receive said bank notes in discharge of said taxes due the State of Tennessee, from the said petitioner Furman as afore-
9 said, which notes he holds and tenders in court, subject to the order of the court, and to compell him to issue to petitioners, the firm of Furman, Green & Co., a licens as wholesale merchants for one year, from the first day of August, 1866, and they pray for all such other and further relief as is suited to their case. This is the first application for a writ of mandamas in this cause.

FRANCIS FURMAN.
FRANCIS W. GREEN.
CARUTHERS & COOPER,
J. B. WHITE & JOHN C. GAUT,
Solicitors for Petitioners.

STATE OF TENNESSEE, *Davidson county:*

This day personally appeard before me, the undersigned, one of the acting justices of the peace, in and for said county, Francis Furman, one of the petitioners in the foreging petition, and made oath that the facts therein as stated, as of his own knowledge, are true, and those as stated upon the information of others, he believes to be true.

FRANCIS FURMAN.

Swornt to and subscribed before me, this 3rd day of August, 1866.

W. A. MATHEWS, *J. P.*

STATE OF TENNESSEE:

To the clerk of the circuit court of Davidson county:

You will file this petition, and take bond and security for
10 the complainants for costs, and you will issue a copy of the petition to be served upon the defendant Nichol, this 4th day of August, 1866.

M. M. BRIEN, Sr.,
Judge 9th Circuit.

Know all men by these presents, that we, Francis Furman, Francis W. Green, and Geo. Searight, are held and firmly bound unto P. L. Nichol, in the sum of two hundred and fifty dollars, to be void on condition that F. Furman and F. W. Green des pay and satisfy all costs that may issue in this behalf, in the prosecution of a writ of mandamas this day commenced by them in the circuit court of Davidson county, Tennessee, against the said P. L. Nichol.

Witness our hands this August 4th, 1866.

FURMAN, GREEN & CO.
GEO. SEARIGHT, *Security.*

Mandamas.

STATE OF TENNESSEE:

To the sheriff of Davidson county, greeting:

Whereas, Francis Furman and Francis W. Green, on yesterday, presented to me their petition, worn to, praying for a writ of mandamas against Philip L. Nichol, clerk of the county court of Davidson county, Tennessee, in which it is alledged, that on the 1st day of August, 1866, the said Furman and Green formed a partnership under the firm, name, and style of Furman, Green, & Co., as wholesale merchants in the city of Nashville, Tennessee. That
11 on the 3d day of August, 1866, said new firm tentered a bond as provided by law, and his fees of office to said clark, and demanded from him a yearly wholesale license for said firm, which said clerk refused to receive, and refused to issue said license, because of the petitioner Furman, who had been a wholesale merchant in said city, had not paid his State and county taxes for the preceding year in par funds; and because it is further alleged in said peti-

tion that said Furman, on the 3rd day of August, 1866, before said application for said license, appeared before said clerk, at his office, and tendered to him a sworn statement of the invoice cost of all the goods which had been brought into his said mercantile establishment for sale since the 28th day of August, 1825, the date of said Furman's license. That the county taxes due thereon amounted to $883 65; and the State taxes due thereon amounts to $3,534 58. That the said Furman tendered, and offered to pay said clerk, the said county taxes in the currency of the United States, and the said taxes due the State of Tennessee in the notes and issues of the Bank of Tennessee, bearing date, and issued by said bank, prior to the 6th day of May, 1861. That said clerk refused to receive said county taxes in the legal currency of the United States, and said taxes due to the State of Tennesse, because the said notes of the Bank of Tennessee were not pair funds; and be cause Furman would not also pay taxes due to the State of Tennessee, in United States currency instead of said bank notes, the said clerk refused to accept of the said bond of the firm of Furman, Green and Co. and his fees,
12 and refused to issue a license to said firm as demanded.

Now this is to command you, the said sheriff, to read and make known the contents of this writ to the said P. L. Nichol, clerk as aforesaid, and summon him to be and appear before the circuit court, to be held for the county of Davidson, in said State, at the court-house in Nashville, commencing on the first Monday of September, 1866, and on the 3rd day of said term, to answer said petition, and to show cause why a pre-emptory mandamas shall not issue against him, to compell him to receive said county taxes and said bank notes for said State taxes and said bond, and to compell him to issue said license, unless, in the meantime, all of said things shall have been done, received, and performed by him.

Yo will, also, read this writ to George L. Stubblefield, the attorney general of the ninth judicial circuit in said State, so that he may have notice of these proceedings, and may appear in said court at said time and place, and defend the interest of the State of Tennessee in said suit, if he may deem it his duty to do so, and you will have in said court, at said time, this writ with your return thereon of your action in the premises.

Given under my hand and seal this 4th day of August, 1866.

M. M. BRIEN, Sr.,
Judge, &c., 9th Circuit.

13 *Issueance—issued 4th August,* 1866.—*Return.*

Came to hand the same day, issued and executed by making known the contents of this writ to P. L. Nichol, clerk of the county court of Davidson county, Tennessee, and delivered to said Nichol a copy of the petition filed in this cause as commanded, August 4th, 1866.

W. C. SHAW, *D. Sh'ff.*

Bond.

We, F. Furman, F. W. Green, and R. T. Kirkpatrick are held and firmly bound unto the State of Tennessee, in the penal sum of one thousand dollars for the use of said State, conditioned that if the said Furman, Green & Co. shall, at the end of twelve months from the date thereof, render to the clerk of the county court, of Davidson county, in said State, a sworn statement of the invoice cost of all the goods which they or their assignee shall have brought to their establishment, in said county, for sale within the said twelve months, and that they will pay the clerk the tax upon such goods, and otherwise, in all things, comply with the revenue laws of said State, then this obligation to be void, otherwise to remain in full force and effect, this 1st day of August, 1866.

FURMAN, GREEN & CO.
R. T. KIRKPATRICK.

Demurrer.

FURMAN, GREEN & CO. *vs.* P. L. NICHOL. } Petition for mandamas in circuit court of Davidson county, Sept. term, 1866.

14 And the defendant, by his attorney, comes and says that the matters stated in said petition, as the same are alleged and set forth by petitioners, are not sufficient in law for the said petitioners to have and maintain their said petition, and to have the mandamas prayed for in said petition, and demurs to said petipetition, and for causes of demurer set down the following:

First. Said petition does not show that there was a contract between the State of Tennessee and the said petitioner, or either of them, that the notes of the Bank of Tennessee, held by petitioners, be received in payment of taxes due to the State of Tennessee from said petitioner.

Second. Said petitioners have failed to show, in their said petition, that they became the holder of the said notes, the issues of the Bank of Tennessee, before the passage of the act of the general assembly of said State, passed in 1858, entitled "An act to revise the statutes of the State of Tennessee," (Title 4, chap. 5, art. 2, of the Code of Tennessee,) or that they became the holders of said notes before the passage of the act repealing the charter of the Bank of Tennessee, passed on the day of , 1866. For these and other causes, to be shown on argument, defendant prays the judgment of the court, whether he shall make further answer to said petition, and that the said petition be dismissed.

CARUTHERS and COOPER,
GAUT and WHIT,
Att'ys for Pl'ff.
HORACE H. HARRISON,
EAST and SPURLOCK,
Attorneys for Def't.

Joinder in demurrer.

15 And afterwards at the September term, 1866, and on Wednesay, the 5th day of September, 1866, the following entry is made, to wit:

Demurrer filed.

FURMAN, GREEN & CO. vs. P. L. NICHOL. } Mandamas.

The parties appear by attorney, and defendant this day filed a demurrer to the petition filed in this cause, which demurrer is continued, with the questions involved in this cause, until Monday morning next.

And afterwards, at the same term, and on Tuesday, the 9th day of October, 1866, the following entry is made:

Judgment.

FURMAN, GREEN & CO. vs. P. L. NICHOL. } Mandamas.

The parties appear by their attorneys, and on argument of the demurrer heretofore entered in this cause, the same is, upon due consideration of the court, overruled, and the defendant allowed, until Monday, the 8th day of October, 1866, two weeks time in which to plead, from the time the demurrer was overruled by the court; and defendant having had the entire day, to wit: the 8th day of October, 1866, in which to plead, have declined to do so.

It is further considered by the court, that a pre-emptory mandamas issue forthwith, commanding the defendant to receive of the plaintiffs, in payment of plaintiff's State tax, as merchants,
16 the notes or issues of the Bank of Tennessee, issued prior to the 6th day of May, 1861, and to issue to plaintiffs a license, and that the plaintiffs recover of the defendant their costs in this behalf expended, for which execution may issue.

From the opinion of the court overruling the demurrer in this cause, the defendant prays an appeal in the nature of a writ of error, to the next supreme court to be held at Nashville, on the first Monday in December next, which is granted; bond and security having been given according to law.

Appeal bond.

Know all men by these presents, that we, P. L. Nichol, clerk, &c., and Horace H. Harison, are held and firmly bound unto F. Furman & Co., or their certain attorney, executors, administrators, or assigns,

in the penal sum of one hundred dollars, for the true payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seal, and dated this 9th day of October, 1866.

The condition of the above obligation is such, that whereas the above bound P. L. Nichol, clerk, &c., has prayed and obtained an appeal in the nature of a writ of error, from the circuit court of Davidson county to the supreme court of errors and appeals at Nashville, in the State of Tennessee, on a judgment of said circuit court, recovered at the present term thereof by the said F. Furman & Co., against the said P. L. Nichol, clerk, &c., for costs of suit.

17 Now if the said P. L. Nichel, clerk, &c., shall well and truly prosecute his said appeal with effect, or in case he fail therein, pay and satisfy the whole debt, damages, and costs, which may be awarded against him for wrongfully prosecuting said appeal, and satisfy the judgment of said supreme court thereon, then the above obligation to be void, else to remain in full force and effect.

P. L. NICHOL, *Clerk.*
HORACE H. HARISON.

Bill of cost.

State tax		$5 00
Clerk, Love, receiving and filing petition	75	
Demurrer, 25; judgment, 75	$1 00	
Judgment on demurrer	75	
Do. for costs, 25; order and bill costs, 75	1 00	
Order sitting, 10; docketing, 25	35	
Do. for fi. fa., 25; copy bill costs 25	50	
Appeal bond, &c., $1 25; transcript, $4 80	6 05	
Certificate and seal, 50; stamp, 05	55	
		10 95
Sheriff, W. C. Shaw, ex. process		1 00
		$16 95

STATE OF TENNESSEE:

I, David C. Love, clerk of the circuit court for the county of Davidson, in the State aforesaid, do certify that the foregoing is a correct transcript of the record and proceedings had in said

18 court, in the case heretofore prosecuted and determined therein, between Furman, Green & Co., plaintiffs, and Philip L. Nichol, defendant, as the same remain of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at office, at Nashville, the 10 day of January, in the year one thousand eight hundred sixty-seven, and in the ninety-first year of our independence.

DAVID C. LOVE, *Clerk.*

Charter of the bank of Tennessee.

An act to establish a State bank, to raise a fund for internal improvement, and to aid in the establishment of a system of education.

Bank establishment.

SECTION 1. Be it enacted by the general assembly of the State of Tennessee, That a bank shall be and is hereby established, in the name and for the benefit of the State, to be known under the name and style of "The Bank of Tennessee," and the faith and credit of the State are hereby pledged for the support of the said bank, and to supply any deficiency in the funds hereinafter specifically pledged, and to give indemnity for all losses arising from such deficiency.

Capital stock.

SEC. 2. Be it enacted, That the capital of said bank shall be five millions of dollars, to be raised and constituted as follows: the whole of the common school fund, whether the same is vested in stock in the present banks in the State, or in the hands of the superintendant of public instruction, or in the hands of the county agents or other persons, except so much as may have been vested in any works of internal improvement, as well as the proceeds of the Ocoee lands, shall constitute a part of the capital of the Bank of Tennessee; the surplus revenue on deposit with
20 the State, together with the unexpended interest thereon, shall also constitute a part of the stock of said bank; and in addition to these amounts a sum shall be raised in specia, or funds convertible into specia at par value, on the faith of the State, sufficient to make the whole capital five millions of dollars; Provided, that if the fourth installment of the surplus revenue, appropriated under the act of Congress, approved 23d June, 1836, should be deposited with this State, the amount received shall be added to and constitute a part of the capital of said bank, and be an addition to the capital stock of five millions of dollars above specified; Provided, further, that the stock owned by the State, in the Union Bank, shall not constitute any portion of the capital of the Bank of Tennessee.

Of the common school fund.

SEC. 3. Be it enacted, That the money belonging to the common school fund, which now may be in possession of the superintendant of public instruction, or which may hereafter come into his possession, shall be handed over to the president and directors of the Bank of Tennessee, as capital in said bank, and said president and directors, or a majority of them shall be authorized and required for, and in behalf of the State, and with a pledge of the publick faith and credit, to issue to the superintendant aforesaid State stock or certificates of debt, for such sum or sums as may be from time to time paid over by
21 the said superintendant to the said president and directors; and the governor of the State the comptroler of the treasury, and the superintendant of public instruction, shall dispose of the stock in any and all of the banks of the State, belonging to the common school fund, whenever the same can be sold at par for specie, or funds convertible into specie, at par value, and pay over the proceeds

to the president and directors of the bank, who shall issue certificates of stock to the superintendent of public instruction as aforesaid; Provided, that any dividends on the same, which shall not be declared at the time of the sale, shall not be sold with the stock, but the same shall be received by the superintendant and paid over to president and directors of the bank, and shall constitute a part of the contingent fund, to meet the annual or semi-annual liabilities of the bank, so shall also the interest and dividends which may hereafter arise on any portion of the capital of the school fund, before said capital is paid over to the president and directors of said bank; and in like manner the superintendent of public instruction shall pay over the proceeds of the sale of the Ocoee lands as they are received, and take certificates of stock; Provided, that if a system of common schools shall be adopted and put into operation, by the present general assembly, the funds which may accrue after the year
22 1837, for the benefit of common schools, from the bonuses of the present banks, and bonuses and dividends arising from other incorporate companies, and from privileges, fines, penalties, and taxes, shall constitute part of the annual fund for distribution by the superintendent and shall not be subscribed in stock in the State bank. But should a system of common schools not be adopted as aforesaid, then said funds to be vested in stock in said bank, until otherwise directed by the general assembly.

The surplus revenue.

SEC. 4. Be it enacted, That it shall be the duty of the comptroler of the treasury to draw from the Union Bank, the Planters' Bank, and the Farmers' and Merchants' Bank, the amount of the surplus federal revenue now on deposite with said banks, in two yearly installments; the first installment to be drawn on the 1st day of January, 1839, each installment to be drawn in specie or funds convertible immediately into specie at par value; and as soon as each installment is received, he shall pay over the same to the president and directors of the State bank, and receive certificates of stock, which shall be kept by him for the benefit of the State; Provided, that if the said banks, or either of them, shall fail or refuse upon demand made as aforesaid, to pay over the surplus, or any part which may be demanded at the times aforesaid, then the comptroler sall direct suits to be
23 instituted by the attorney general of the State, for the amount so witheld, together with the ten per cent. authorized by their charters; and until said installments are demanded, the present banks shall hold the surplus at the rate of six per cent. *per cent.* per annum, payable half yearly, and the interest so accruing shall constitute part of the sinking fund hereinafter designated.

Govenor to execute bonds.

SEC. 5. Be it enacted, That it shall be the duty of the govenor of the State, on behalf of the State, to execute the bonds of the State, for two and a half millions of dollars, which bonds shall be signed officially by the govenor, and countersigned by the secretary of State, with the seal of the State affixed, and payable thirty years after date to the president and directors of the Bank of Tennessee, or their assigns, bearing an

interest not exceeding six per centum per annum, which shall be payable semi-annually, at the office of the treasurer of Tennessee, or at such other place within the limits of the United States, as the president and directors may select, which said bonds shall be delivered to the president and directors of said bank; Provided, the govenor shall execute said bonds of any amount, not less than one thousand dollars each, and payable in such denomination of money as the president and directors may require, which bonds, and also those hereafter directed to be issued to pay for stock in internal improvement companies, shall be made payable to, and be sold
24 and disposed of by the president and directors of said bank, for specie, or funds convertible into specie without loss, and shall not be sold at a discount. And whenever any State bonds may be issued for the benefit of any internal improvement company, as hereinafter directed, the governor shall deliver them to the president and directors of the bank, and the full amount thereof, at their nominal value, when the proceeds are received by the bank, shall be placed to the credit of the company for whose benefit such bonds may be issued, and any premium for which such bonds may be sold, shall inure to the benefit of the State; Provided, that if at the end of ninety days after any bonds may have been delivered to the bank; such bonds have not been sold at par as herein provided for, then the president and directors of the bank, shall, on application of the president and directors of the internal improvement company, for which such bonds were issued, deliver the same to them upon their receiving them in payment of the State's subscription at their nominal value; or the said president and directors of the bank may at their election pay such internal improvement company the amount of such bonds, at their nominal value, and retain the same, to be kept or disposed of for the benefit of the State.

Govern'r to nominate directors.

SEC. 6. Be it enacted, That immediately after the location of the principal bank and branches, the govenor of the State shall nominate and appoint
25 twelve persons to act as directors, more than one-third of whoom shall in no case be merchants; and which nomination and appointment shall be subject to confirmation or rejection by the general assembly, and the twelve persons so nominated and confirmed shall constitute the directors, one of whoom shall be the president, who are hereby incorporated, and made a body politic and corporate, by the name and style of "the president and directors of the Bank of Tennessee," and shall so continue until the 1st day of January, 1868, and by that name shall sue and be sued, plad and be impleaded, and they are hereby made able and capable in law, to have, receive, purchase, enjoy, and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattles, and effects, of what kind, nature or quality soever, and the same to sell, grant, demise, alien or dispose of; and also to make, have and use a common seal, and the same to break, alter and renew at their plasure, also to ordain, establish and put in execution such by-laws, ordinances, and regulations, as shall seem necissary and convenient for the government of

said corporation, not being contrary to the laws and constitution of the State, or of the United State.

Director's time of service.

SEC. 7. Be it enacted, That the president and directors, as elected, shall continue in office for two years, and until their successors are nominated and confirmed as aforesaid.

26 SEC. 8. Be it enacted, That of the dividends which shall be declared by the bank, one hundred thousand dollars shall be annually set apart for common schools, and the faith of the State is hereby pledged for an anual appropriation of said amount to common schools, to be applied as the general assembly may direct. Of the dividends of the bank remaining, there shall be annually appropriated, for thirty years, and no longer, or not so long if the bank should not continue so long in operation, eighteen thousand dollars to county academies, to be applied as the general assembly may direct, and the faith of the State is hereby pledged for the annual payment of said sum: Provided, the trustees of the respecive county academies in the several counties in this State shall relinquish to the State all claims which they have against the State of Tennessee for the debt due to those institutions from citizens residing south of French, Broad, and Holston, and west of Big Pigeon rivers, and all claims they may have to lands in the Ocoee district, as well as all claims which they have against said citizens, which relinquishment shall be filed in the office of the secretary of State; and the proceeds of two half townships of land in the Ocoee district, reserved by the act of disposing of said lands for the use of colleges and academies, shall be set apart for and given to the East Tennessee College and Nashville University, upon the trustees
27 of said institutions executing such relinquishments as are herein directed for the academies; and, provided, further, that such of said institutions as shall relinquish, as herein provided for, shall be entitled to their rateable proportion of the fund herein appropriated, according to the terms of said appropriation, and on such further conditions as the present general assembly may prescribe; in the event the federal government shall hereafter relinquish to the State of Tennessee the vacant lands south and west of the Congressional reservation line, an amount of forty thousand dollars, out of the sale of those lands, shall be set apart as a perpetual fund for the purpose of a college in the wessern district: Provided, that the general government, in the act of relinquishment, shall grant to the use of such college the appropriation herein made. The balance of the dividends shall be set apart as a sinking fund, to be applied to the extinguishment of the accruing interest on the bonds of the State, whether the same have been executed under any former act or may be executed under this act.

Application of dividends.

SEC. 9. Be it enacted, That the following powers, rules, conditions, limitations, and restrictions, shall be fundamental laws of said bank, viz:

ARTICLE 1. The board shall select one of their number to preside over their deliberations, who shall be elected by a majority of the di-

rectors present, of whoom not less than five shall constitute a
28 quorum to do business; and no person not a citizen of this State, or who is a stockholder or director of any other bank, or copartner of any such director in trade and merchandise, shall be eligible as a director: Provided, should it so happen that any director should be appointed who is a stockholder or director in any other bank, his seat shall be considered vacant, and the place filled by the other directors as in other cases of vacancy; and, provided, further, if any director appointed as aforesaid shall, during his continuance in office, purchase stock or become a director in any other bank, his seat shall be vacated, which shall be filled by the directory as in other cases.

ART. 2. The president and directors, for the time being, shall have power to elect and remove the cashier, and they also shall have power to appoint such officers, clerks, and servants under them as shall be necessary for executing the business of the said corporation, and allow them such compensation for their services as may be reasonable.

ART. 3. No director shall be entitled to any emolument, but the directors, for the time being, shall have power to make such compensation to the president of the bank, for his extraordinary attendance at the bank and superintending its concerns, as shall to them seem reasonable. No discount shall be made when the cashier may be a maker or endorser.

ART. 4. They shall receive money on deposit, and pay away
29 the same to order, free of expense, deal in bills of exchange, and buy and sell any of the State stock now issued, or that may hereafter issue, and discount notes at said bank, with two or more good endorsers thereon, at a rate of interest not exceeding six per cent. per annum: Provided, that this article shall not be construed so as to prevent the said bank from demanding and receiving a reasonable premium for exchang, in addition to the interest, upon bills or notes payable at a point beyond the limits of his State: Provided also, that said bank, or either of said branches, never shall purchase and have running to maturity, or on hand, a greater amount of bills of exchange than the amount of notes under discount.

ART. 5. The total amount of debts which said corporation shall at any time owe, whether by bond, bill, note, or contract, shall not exceed twice the amount of the capital stock paid in at the time, over and above the moneys on actual deposit for safe keeping; nor shall the entire amount of the risk or investment or securities, in what form soever, (save and except actual current coin,) at any time exceed twice the amount of the capital stock paid in.

ART. 6. In case of excess, the directors, under whose administra-
tion it shall happen, shall be liable for the same in their pri-
30 vate capacities, and an action of debt may in such case be braught against them, or any of them, or their heirs, executors, or administrators, in any court of this State having jurisdiction, by any creditor or creditors of the said corporation, and may be prosecuted to judgment and execution; any condition, covenant, and agree-

ment to the contrary notwithstanding. But this shall not be so construed as to exempt said bank, or the lands, tenements, goods, or chattels of the same, and on their insufficiency, the State of Tennessee being also liable for, and being chargable with the said excess. Such of the directors who may have been absent when said excess was contracted or created, shall be exonerated from individual liability, or who may have dissented from the resolution or act by which the same was contracted or created, may respectively exonorate themselves from being individually liable, by entering, if present, their dissent on the books of the bank at the time the debt may be so contracted, and forthwith give notice of the same to the comptroler of the State.

ART. 7. In case of vacancy, occasioned by the death, resignation, or removal out of the State, or otherwise, of any director, a majority of the directors shall fill such vacancy, and the director so appointed shall hold his office during the unexpired term of the director so vacating; and in case of sickness or necessary absence of the
31 president, the board may appoint a president for the time.

ART. 8. The directors shall keep fair and regular minutes of their proceedings in a well bound book, and on questions where two directors shall request it, the yeas and nays shall be ordered; and on all such questions every member present shall be required to vote; and thes minutes shall at all times be produced on the demand of the legislature, or any committee legally authorized to require the same.

ART. 9. Every person and cashier, before he enters on the execution of his duty, shall give bond, with two or more securities, to the satisfaction of the directors, payable to the govenor of the State, in a sum not less than one hundred thousand dollars, conditioned for the faithful performance of his duty; and the tellers and clerks shall give like security in a sum not less than twenty thousand dollars, which bonds shall be filed and recorded in the secretary's office.

ART. 10. The president, directors, and cashier, and all other officers of the principle bank and branches, shall take and subscribe the following oath, on entering on the duties of their respective offices: "I, A B, do solemnly swear or affirm, that I will faithfully discharge the trust reposed in me as ——— of the Bank of Tennessee, and that I will not wilfully or knowingly violate any direction or provision of the charter thereof. So help me God."

ART. 11. All bills, bonds, and notes of the corporation shall
32 be signed by the president and countersigned by the cashier thereof, and the fund of the bank shall in nowise be held responsible therefor, unless the same shall be executed as aforesaid.

ART. 12. The bills or notes which it shall be lawful for said corporation to issue and circulate, shall not be for a less denomination than five dollars, and after the first day of January, 1841, not less than ten dollars.

ART. 13. The board of directors shall be capable of exercising such other powers and authorities as may be necessary for the well governing and ordering of the affairs of the said corporation, and of promoting its interests and credits.

Of its bills.

SEC. 10. Be it enacted, That the bills obligatory or of credit, under the seal of said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons, and of his, her, or their assignee or assignees, and so as absolutely to transfer and vest the property thereof in each and every assignee or assignees successsively, and to enable such assignee or assignees to bring and maintain an action thereupon in his, her, or their name or names, and bills or notes which may be assigned by order of the said corporation, signed by the president, and countersigned by the cashier thereof, promising the payment of money to any person or persons, his, her, or their order, or to bearer,
33 though not under the seal of the said corporation, shall be binding and obligatory upon the same, in like manner and with the like force and effect as upon any private person or persons, if issued by him, her, or them, in his, her, or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by such private person or persons; that is to say, those which are or shall be payable to any person or persons, his, her, or their order, shall be assignable by endorsement, in like manner as foreign bills of exchange now are, and those which are or shall be payable to bearer, shall be negotiable and assignable by delivery only.

Statements to be furnished.

SEC. 11. Be it enacted, That it shall be the duty of the president and directors of the principal bank and branches to furnish to the general assembly, within the first week of every regular session, statements of the amount of the capital stock of said corporation, and of the debts due the same, of the monies deposited therein, of the notes in circulation, and of the cash on hand, together with all other property of said bank, both real and personal; and the general assembly shall have the right to inspect all such accounts in the bank as relates to the transaction of said principle bank and branches, and shall, whenever it may be deemed necissary, appoint a joint committee of both houses of the general assembly ior that purpose, with full power to send persons and papers; and it shall be the duty of the comptroler to
34 inspect all accounts in the books of the principle bank and branches, as often as he may plase; and it shall, and is, hereby declared to be his duty, faithfully to report all and every violation of the fundamental rules of this corporation to the legislature.

Notes made receivable at treasury.

SEC. 12. Be it enacted, That the bills or notes of the said corporation, originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes, or other moneys due to the State.

Director may be expelled.

SEC. 13. Be it enacted, That a majority of the members present at any regular meeting of the directors of the principle bank and branches, may suspend any director, with a view to his expulsion, and any member

may be expelled, at a meeting of a board of directors specially convened by the president for that purpose, as soon after such suspension takes place as practicable; but such expulsion shall not be made by a majority of less than two-thirds of the whole number of directors.

Duty of comptroler.

SEC. 14. Be it enacted, That it shall be the duty of the comptroler to make a biennial report to the legislature on the subject of the principle bank and branches, and if, in his opinion, the transactions of the principle bank and branches, or any particular circumstance relating thereto, shall require it, he shall apply to the general assembly for a select committee, who shall take into consideration any matters relating to the principle bank and branches, submitted to them by the comptroler, and the comptroler shall be furnished by the principal bank and branches with a general statement of their condition once in every month.

Quarterly statements to be published.

SEC. 15. Be it enacted, That it shall be the duty of the president and directors of the bank to publish quarterly, in some newspaper, the state and condition of the bank and its branches.

Its officers' liabilities.

SEC. 16. Be it enacted, That if any president, director, or cashier, or other officer of the said bank, or any of its branches, shall embezzel, or fraudulently convert to his or to their own use, any sum of money, bank note, bill of exchange, check, bond, or other security, placed under his care and management, the person so offending, his aiders, abettors, and counsellors, upon conviction thereof, shall be judged guilty of felony, and be sentenced to imprisonment in the State penitentiary for a term not less than three years nor more than twenty-one years, the term to be fixed at the discretion of the jury trying said offence, and shall forever thereafter be disqualified from holding any office of profit or trust in this State, and shall, moreover, be liable for the sum embezzled.

Dividends to be apportioned.

SEC. 17. Be it enacted, That the sums discounted on notes, with two or more sufficient securities, as provided for by this act, shall be apportioned, as far as practicable, among the several counties in this State, annually, in proportion to the qualified voters, and the president and cashier of the bank or branch shall give notice, in some public paper, printed in the county in which the bank or branch may be located, stating the amount that each county may be entitled to borrow, within ten days after the right to borrow in manner aforesaid may arise; and should the sum, or any part thereof, to which any county should be thus entitled, be not applied for within fifteen days after such notice, by the inhabitants thereof, by presenting bills or notes for discount, with good endorsers, then it may be discounted as aforesaid, to any person or persons applying for the same. The principle bank and three branches shall be located in Middle Tennessee, two branches of the said bank in the western district, and two branches in East Tennessee.

SEC. 18. Be it enacted, That the lands, tenements, and hereditaments which it may be lawful for said corporation to hold, shall be only such as shall be requisite for its immediate accommodation for the transaction of its business, and such as have been bona fide mortgages to it by way of security for, or conveyed to it in satisfaction of debts previously contracted in the course of ordinary banking business, or purchased at sales upon judgment for decree rendered in favor of said bank.

37 Duty of governor.

SEC. 19. Be it enacted, That it shall be the duty of the govenor, as soon as the directors are appointed of the principle bank and branches, to convene the several boards of the same by advertisement in some newspaper, giving ten days' notice thereof, at the place the bank or branch may be located, for the purpose of carrying this act into effect.

Liabilities of internal improvement companies.

SEC. 20. Be it enacted, That whenever the president and directors of any company incorporated for the purpose of internal improvement shall negotiate any bonds executed under the provisions of this act, it shall be their duty to notify the president and directors of the bank of the place at which the interest on said bond is stipulated to be paid, which shall be within the limits of the United States, and the president and directors of the bank shall provide for the payment of the interest aforesaid out of the dividends of the bank: Provided, That if there shall be a surplus of the dividends, after setting apart the amount appropriated to common schools and academies, and after paying the interest on the bonds of the State, the same shall be held by the bank as a contingent fund, to be appropriated at any time when there may occur a deficiency in the dividends for the purposes aforesaid: and, provided, also, that if at any time there shall be a deficiency in the dividends to liquidate the accruing interest on the State bonds,

38 and the contingent fund shall be insufficient for such purposes, such deficiency shall be made up out of any uninvested dividends that may have been declared on the stock owned by the State in the several works of internal improvement; and if there should still be a deficiency, then the same shall be made up by the individual stockholders of the several roads in which the State has subscribed for stock, in proportion to the amount for which the State may have issued her bonds in each, the amount so paid by the several companies to be reimbersed out of the first dividends declared in favour of the State on her stock in said companies. In the event the dividends of the bank and the profits arising from the stock of the State in internal improvements shall prove insufficient to liquidate the interest on the bonds of the State, issued for the purpose of internal improvement, it shall be the duty of the govenor to notify the president and directors of such companies, in which the State has been subscribed for stock, at least three months before the interest will become payable on the States' bonds, of the probable deficit, and of the amount which will be required of each company to be paid in order to meet the interest on the bonds of the State, and upon receiving such notice from the govenor, it shall be the duty of the president and

directors of each and every company thus notified, forthwith to make a call upon the individual stockholders for an amount equal
39 to the sum clamed by the govenor in his notice to said companies, wich sum or sums of money shall be paid at the time, place, and manner required by the govenor, and upon failure thereof, by any of said companies, to meet the installments thus required, it shall be deemed and taken to be a forfeiture of the interest of the individual stockholder or stockholders thus failing to pay the installment called for by the govenor: and, provided, further, that no State bonds shall be issued for the payment of State stock, in works of internal improvement, under the provisions of this act, until the bank hereby established shall go into operation.

State to take one half stock in turnpikes.

SEC. 21. Be it enacted, That the State of Tennessee shall become a subscriber for one-half of the capital stock in all railroads, macadamised turnpikes, and sanded turnpikes, for which acts of incorporation have heretofore been granted, or for which acts of incorporation may be hereafter granted: Provided, that the subscription on the part of the State shall not exceed an avarage of three thousand dollars per mile in any company of macadamized turnpike, nor shall it exceed one thousand dollars per mile on graded turnpikes, nor seven hundred and fifty dollars per mile in sanded turnpikes: Provided, also, the subscription by the State to the Charleston and Cincinati railroad, and the Hiwassee railroad, shall not exceed one million three hundred
40 thousand dollars, to be equally divided between them, and to be expended within the State of Tennessee.

Duty of governor.

SEC. 22. Be it enacted, That whenever the govenor shall be notified in writing by the president and directors of any company, for the construction of railroads, macadamized turnpikes, graded turnpikes, or sanded turnpikes, that one-half of the capital stock of said company has been subscribed for, thereupon the govenor shall appoint a number of directors, not to be stockholders, equal to the number elected by individual stockholders, and if, in the opinion of two-thirds of said entire board, the payment is well secured by the individual stockholders, or that the individual stockholders are good and solvent persons, and fully able to pay the amount of tock subscribed for by each of them, and that they have paid ten per cent. upon the stock, the govenor of the State is hereby authorized and empowered, and required to subscribe, on behalf of the State, for the amount provided for in the foregoing section; and from the date of the subscription by the govenor, the State shall have a lein upon the property of each individual stockholder to the amount of the stock owned by each, and upon the failure of any stockholder to pay any subsequent installment after the first, such failure shall not operate as a forfeiture of the stock unless the president and directors
41 shall so agree, but payment shall be enforced by the president and directors, and no transfer or assignment of tock shall defeat the said lein: Provided, that said lien shall cease after the individual stockholders shall have paid in one-half their stock.

SEC. 23. Be it enacted, That whenever the individual stockholders

Further duty of governor.

of any of said companies in which the State has become a stockholder under this act, shall have paid five per cent., in addition to ten per cent. heretofore provided to be paid, making fifteen per cent. upon the amount of their stock, and the president and directors of such company shall notify the govenor of that fact, he is hereby authorized and required to issue the bonds of the State, signed officially by him, and counter-

State stocks.

signed by the secritary of State, with the seal of the State, payable thirty years after execution, and bearing an interest of five per cent. per annum, payable semi-annually at the office of the trasurer of Tennessee, or suck other places as the president and directors negotiating the same may designate, for an amount equal to fifteen per cent. of the stock subscribed by the State, in said company, and deliver said bonds to the president and directors of said company, in full payment of fifteen per cent. of the State subscription ; and upon the further payment of fifteen per cent. upon the stock of individual stockholders in any of said companies, the govenor shall issue the bonds of the State for fifteen per cent. of more of the stock of the State, in the same manner and under the same rules, regulations, and restrictions as hereinbefore provided,
42 and upon the further payment of five per cent., or more, upon the stock of individual stockholders, the govenor is authorized and required to issue the bonds of the for the like proportion of the stock due by the State, under the same rules, regulations, and restrictions as before, and in like manner the amounts paid by individuals and the State, at the several subsequent calls shall be equal, until the whole amount required to complete the work is paid in ; and from time to time he shall take the receipts of the president and directors for the several sums al paid. So soon as the president and directors of the Louisville, Cincinati and Charleston Railroad Company shall certify to the govenor of the State, and the stockholders of said company have paid in five per cent. as their stock, the govenor of the State shall subscribe, on behalf of the State, six hundred and fifty thousand dollars in stock in said company, and shall issue bonds of the State to said company for five per cent. on the State stock so subscribed, subject nevertheless to the conditions hereinafter provided ; and as soon as the president and directors of the Louisville, Cincinati and Charleston Railroad Company, or a board of directors appointed by said company, to construct that part of the road lying within the limits of Tennessee, shall certify to the governor that a sum has been paid in for the construction of said road within the limits of Tennessee, by individual stockholders upon their stock, equal in amount to fifteen per cent. upon the amount to be subscribed by the
43 State, the govenor shall execute the bonds of the State to said company for the amount of fifteen per cent. of the six hundred and fifty thousand dollars of stock to be subscribed by the State; and whenever individual stockholders in said road shall have paid in a further sum upon their stock, equal in amount to fifteen per cent. upon the stock subscribed by the State, the governor shall issue the bonds of the State for fifteen per cent. of the remaining stock of the

State, and upon the further payment by individual stockholders of an amount equal to five per cent., or more, on stock subscribed by the State, the governor shall issue bonds for five per cent., or more, of the State stock, and so soon on like proportion, until the whole amount is issued, all which is to be laid out within the limits of the State; and whenever the president and directors of the Hiwassee Railroad Company shall notify the govenor in writing of the amount of stock subscribed by individuals in said company, the govenor shall subscribe for an equal amount of State stock; Provided, such amount does not exceed six hundred and fifty thousand dollars, subject to the same rules as to issuing the bonds of the State, as is pointed out by this act for the government of other rail roads and macadamised turnpike companies: Provided, that if the six hundred and fifty thousand dollars should not be subscribed by individuals for stock in said company, and a certificate of that fact
44 made out to the govenor on or before the first day of October next, agreebaly to the provisions of this act, so as to authorize the govenor to subscribe for the full amount of the six hundred and fifty thousand dollars in said company, the govenor shall subscribe for a equal amount of stock in said road, as is or shall be subscribed by individuals, and certified as is directed by the 21st and 22d sections of this act, and the remainder of the six hundred and fifty thousand dollars shall be subscribed by the govenor to any macadamized, sanded or graded turnpike road company in East Tennessee, that shall bring themselves within the provisions of this act; and the govenor is hereby authorized, from time to time, to constitute and appoint proxies to vote for directors in said Louisville, Cincinnati and Charleston Railroad company, and such proxies shall give all other votes he may be authorized to do by virtue of such appointment, agreeable to said provisions of said charter; and provided, further, that if the Louisville, Cincinnati and Charlesto Railroad Company, or the Hiwassee Railroad Company, or either of them, shall fail to obtain the subscription on the part of the State on or before the first day of January, 1839, then, in that case, it shall be the duty of the governor to subscribe for stock in such turnpike roads in East Tennessee as may bring themselves within the general provisions of this act.

SEC. 24. Be it enacted, That the State of Tennessee shall have a
45 Lien. lien on the entire works of said companies respecively for the amount so paid in by the State, and in all, the profits, rents, and tolls of said companies shall inure to the benefit of the State, until individual stockholders shall have paid in their entire stock in said companies respectively: Provided, the right and lein on the part of the State to the entire profits, rents, and toll of the said several works, shall not inure until twelve months after the execution of the bonds of the State, for the last installment on her stock as aforesaid, and then only to the extent of that portion of the individual stockholders who have not paid up the entire amount of their stock, and to remain no longer than said defaulting stockholders fail to pay the same.

State stock in internal improvements limited.

SEC. 25. Be it enacted, That the stock to be taken by the State in the several improvements shall not exceed four millions of dollars, to wit: one million four hundred thousand dollars in East Tennessee; one million six hundred thousand dollars in Middle Tennessee, and one million of dollars in the western district: Provided, that one hundred thousand dollars shall be raised upon the bonds of the State, and be expended as a portion of the fund allotted to East Tennessee, upon the rivers in East Tennessee, as the general assembly may hereafter direct: and provided, also, that one hundred thousand dollars of the fund allotted to the western district of Tennessee be expended upon the rivers in that part of the State, as the general assembly may hereafter
46 direct: and provided, that one hundred thousand dollars of the funds allotted to Middle Tennessee shall be appropriated to the rivers of Middle Tennessee.

Profits on internal improvement — stock appropriated.

SEC. 26. Be it enacted, That the profits arising upon the stock owned by the State in the several works of internal improvement shall constitute a fund, to be applied to the redemption of the bonds of the State executed, and to be executed, for raising the bank capital herein provided for, and the internal improvement bonds of the State.

JOHN COCKE,
Speaker of the House of Representatives.
TERRY H. CAHAL,
Speaker of the Senate.

Passed January 19th, 1838.

47 An act suplimental to the act chartering the Bank of Tennessee.

Of directors of branches.

SECTION 1. Be it enacted by the general assembly of the State of Tennessee, That the president and directors of principal bank shall locate the branches, and appoint twelve directors for each branch of the Bank of Tennessee, of whom one shall be from each of the counties adjoining the one in which the branch is located: Provided, that it shall not reduce the number in the county in which the branch is located to less than seven, who shall remain in office for twelve months, and until their successors are appointed and qualified in the way, possess the qualifications, be subject to the disqualifications and liabilities, and shall have the powers and perform the duties, so far as the same apply, as the directors the principal bank. And the board of directors of the branches, respectively, shall be under the same rules and regulations as the board of directors of the principal bank; but the board of directors of the branches may make necessary by-laws for their government not inconsistent with this act, and the act to which this is a supplement, and not inconsistent with the controlling power given to the principal bank over said branch. Vacancies in the board of directors at the branches shall be filed by the board at the branches, respectively. The officers and servants of the branches shall

48 be appointed by the board of directors at the branches. Officers and servants of the branches shall be qualified, and be subject to the same penalties as officers and servants of the principal bank.

Capital of branches.

SEC. 2. Be it enacted, That when the five millions of the capital stock shall be paid in, the president and directors of the principal bank shall pay over to the several branches of said bank at least four hundred thousand dollars each as the capital, respectively, of said branches: Provided, it shall be the duty the president and directors of the principal bank to employ three millions two hundred and fifty thousand dollars of the capital stock at the different branches, when the whole is paid in; and if, upon the report of the president and directors of any branch or branches authorized to be located by this act, or the act to which this is a supplement, the sum of four hundred thousand dollars cannot be employed at any of such branches so as to yield, after defraying all expences, a nett profit of eight per cent., it shall, in such case, be the duty of the president and directors of the principal bank to withdraw so much thereof as cannot be profitably used, and to transfer the same to such other branch or branches where it can be used best for the interest of the bank and the people, subject to be withdrawn and employed and transferred to any other branch or branches where the same can be used most profitably: Provided, also, the president and directors of the principal bank shall not
49 employ more than one million seven hundred and fifty thousand dollars at the principal bank, unless it shall appear from the reports of the branches that the amount beyond the said sum cannot be employed at a nett profit of at least eight per cent. at any or all of the branches: Provided, further, that the president and directors shall not reduce the amount of capital of either of the branches to a less sum than three hundred thousand dollars. The first distribution of capital shall be made to the branches when the principal bank shall go into operation; and of the first distribution of capital derived from the sale of the State bonds, at least two hundred thousand dollars shall be paid over to each branch; and not more than seven hundred and fifty thousand dollars shall be retained by the principal bank for banking purposes.

Dividends of branches.

SEC. 3. Be it enacted, That each of said branches shall make semi-annual dividends of the nett profits, which shall forthwith be paid to the principal bank, who shall provide for the payment of the interest on the State bonds, and the annual dividends for the support of academies and common schools, as provided for by the act to which this is a supplement.

Of convention for general benefit.

SEC. 4. Be it enacted, That whenever, in the opinion of the president and directors of the principal bank, a change of policy in the management of any particular branch, or of the whole, is required for the general benefit of
50 the institution, they shall have power to call a convention of delegates from all the branches, to be composed of one member from each board of branches, and the president and directors of

the principal bank, to consult and advise in relation to the same; and whatever may be determined on, by a majority of said convention, the same shall be the governing policy of the institution.

President to call convention.

SEC. 5. Be it enacted, That within thirty days after the appointment of the directors of the different branches, it shall be the duty of the president of the principal bank to call a convention of deligates from the branches, to be composed of the president of each of the said branches, and the president and directors of the principal bank, whose duty it shall be to adopt the necessary rules for the intercourse between said principal bank and branches. The proceedings of said convention shall be entered of record at the principal bank by ayes and noes.

Of distribution.

SEC. 6. Be it enacted, That in all cases the funds received as capital by the president and directors of the principal bank, from time to time, shall be distributed in the aforesaid proportions, in kind and value, to the respective branches; and in like manner when the principal bank shall negotiate any bonds for internal improvement purposes, the funds procured shall be distributed in the same proportion, in kind and value, to the branches, upon their placing the proper amount to the credit of the internal improvement companies in their books.

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Notes.

SEC. 7. Be it enacted, That the notes to be issued by the Bank of Tennessee for circulation shall be signed by the president and countersigned by the cashier of the principal bank, and the same may be made payable at such place or places as shall be deemed most advisable by the board of directors of the principal bank. The notes of the bank or branches shall be received in payment of debts to the principal bank or branches: Provided, that if, at any time, the president and directors of the principal bank shall deem it to the interest of the institution, they may authorize the president and cashier of any branch or branches to sign and countersign any or all of the notes to be issued for circulation by such branch or branches: Provided, further, that in furnishing the branches with notes to be issued for circulation, the president and directors of the principal bank shall distribute to each an amount of notes equal to double the amount of capital assigned to the branches respectively.

State bonds.

SEC. 8. Be it enacted, That the bonds of the State for raising three hundred thousand dollars for the improvement of the navigation of the rivers, shall be executed and negotiated by the commissioners at the same time that the bonds for raising the capital of the bank shall be negotiated, and the proceeds shall be deposited in the banks in the three divisions of the State, in equal portions, and the amount so deposited be drawn in the notes of said banks, to be applied as provided by law.

Branches to make monthly statements.

SEC. 9. Be it enacted, That each branch shall render to the principal bank monthly statements of the condition of such branch, including a list of all the

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notes and bills purchased, together with the endorsers and accepors on the same, and which shall be filed

Of director under protest.

SEC. 10. Be it enacted, That no director of the principal bank or branches, who is under protest at said bank, or any of its branches, shall sit in any board of directors whilst under protest at any of said banks; and if any such director remains under protest for the space of thirty days, he shall forfeit his directorship. No director shall act as attorney at law for said bank or branches.

State bonds to be engraved.

SEC. 11. Be it enacted, That the bonds of the State, to be issued under the provisions of the act to which this is a supplement, shall be engraved, under the direction and superintendence of the govenor and secretary of state; and the comptroler of the treasury is hereby required to issue his warrants upon the treasury, from time to time, for such an amount as may be necissary to defray the expences of such engraving.

Construction of the law of subscription to internal improvement companies.

SEC. 12. Be it enacted, That the provisions of the law, passed at the present session of the general assembly, authorizing the governor to subscribe one-half of the stock in works of internal improvement, shall be so construed as to apply to M'Adamized roads, and the Lagrange, Somerville, and Memphis railróad, when part of the stock has been subscribed by individuals, and the governor has subscribed the one-third of the stock so taken, but which is not sufficient to construct the said roads; in such cases the govenor shall, agree-
53 ably to the provisions of the act to which this is a supplement, subscribe the one-half of the capital stock of said companies, or a sum equal to the whole stock taken by individuals in said roads.

Location of principal bank.

SEC. 13. Be it enacted, That the principal bank of the State shall be located at Nashville.

JOHN COCKE,
Speaker of the House of Representatives.
TERRY H. CAHAL,
Speaker of the Senate.

Passed January 26th, 1838.

54 Sec. 33 of the act of 1865, repealing the 12th section of the charter of the Bank of Tennessee.

SEC. 33. Be it further enacted, That section twelve, of an act passed January 19, 1838, entitled "An act to establish a State bank to raise a fund for internal improvements, and to aid in the establishment of a system of common schools," be, and the same is hereby, repealed.

55 *Opinion of the supreme court.*

P. L. NICHOL, clerk, &c., in error,
vs.
FURMAN, GREEN & CO.

On the 14th of August, 1866, Francis Furman and Francis W. Green, citizens of Davidson county, Tennessee, filed their petition in the circuit court of said county, against P. L. Nichol, clerk of the county court of said county, for a writ of mandamus.

The petition alleges, in substance, that on the first day of August, 1866, petitioners entered into partnership, under the firm, name, and style of Furman, Green & Co., as wholesale merchants in the city of Nashville.

Prior to that time, the petitioner Furman, had been a wholesale licensed merchant in the city of Nashville, and as such, said clerk, on the 28th day of August, 1865, issued to him a weolesale yearly license for the year next ensuing. On the 3d day of August, 1866, said Furman appeared before said clerk, at his office, and tendered to him a statement, under oath, of the invoice cost of all the goods which had been braught into his said mercantile establishment for sale since the date of said licenses up to that time. Upon said statement there were taxes due the county of Davidson, the sum of $833 65,
which sum was tendered to said clerk, in lawful currency of
56 the United States, and which he refused to accept unless said
Furman would also pay the taxes due the State in like currency.

Upon said statement there was due from said Furman to the State, as State tax, the sum of $3,534 58.

Furman then tendered to said clerk the sum of $3,535, in the notes and issues of the Bank of Tennessee, issued prior to the 6th day of May, 1861, in full payment and discharge of said sum of taxes due from him to the State of Tennessee, which said clerk refused to accept, because the same were not at par.

Furman, Green & Co., also applied to said clerk for a license, as such wholesale merchants, for the next ensuing year, and tendered to him a bond, as required by law, as they believe it was their right and duty to do, before they proceeded to purchase and sell goods, wares, and merchandise, in the name and business of the new firm.

The clerk refused to accept the bond and to issue the license, because Furman had not paid the State tax due from him, as aforesaid, in par funds, and had only tendered and offered to pay the same in notes and issues of the Bank of Tennessee, as aforesaid.

The petition also states that the Bank of Tennessee was incorporated by an act of the general assembly of the State of Tennessee,
passed on the 19th of January, 1838, entitled "An act to es-
57 tablish a State bank, to raise a fund for internal improvements,
and to aid in the establishment of education," which act is particularly refered to and mad a part of the petition, so far as the same may be aplicable to the rights of the petitioners.

The petition further alleges, that the bank notes tendered as aforesaid were issued by said bank, as provided for in the 12th section of said act of incorporation, and made payable to bearer; that said corporation is still in existence, and the charter unrepealed; that the bank was organized and issued its bills or notes under the provisions of said charter, which circulated as money and legal currency, and insists petitioner Furman had the right to pay said taxes due from him to the State, under a contract between him and the State.

The petitioner prays that writ of mandamus nisi issue, directed to said Nichol, clerk as aforesaid, commanding him that unless, in the

meantime, he receive said bank notes and bond, tendered as aforesaid, and issue said license, he appear and answer said writ, and show cause, if any he can, why a peremptory writ shall not issue against him, to compel him to receive said sum of $3,535 in the notes tendered as aforesaid, and also to issue to the petitioners a license, as demanded.

A writ nisi was awarded, and Nichol having been duly
58 served with process, appeared, by his attorneys, and demurred to the petition, and set down and assigned the following causes of demurrer, to wit:

First. "Said petition does not show that there was a contract between the State of Tennessee and the said petitioner, or either of them, that the notes of the Bank of Tennessee, held by petitioners, should be received in payment of taxes due to the State of Tennessee from said petitioners.

Second. "Said petitioners have failed to show in their said petition that they became the holders of the said notes—the issue of the Bank of Tennessee—before the pasage of the act of the general assembly of said State, passed in 1858, entitled 'An act to revise the statutes of the State of Tennessee,' (title 4, ch. 5, art. 2, of the code of Tennessee,) or that they became the holders of said notes before the passage of the act repealing the charter of the Bank of Tennessee, passed on the day of , 1866."

The petitioners joined in demurrer, and upon argument had thereon, the same was overruled. Time was given the defendant within which to plead, which he declined to do; and thereupon, a peremptory writ of mandamus was awarded, commanding the defendant to receive of the petitioners, in payment of the State tax due as aforesaid, the notes or issues of the Bank of Tennessee issued prior to the 6th day of May, 1861, and to issue to them a license,
59 etc.; from which judgment of the circuit court the defendant, Nichol, has appealed in error to this court.

The question presented for our consideration in argument, and upon which it is conceded this case must depend, is this: Was the clerk of the county court of Davidson county bound to receive the notes of the Bank of Tennessee tendered in payment of the taxes allleged due the State?

The question is one of immence magnitude, the proper solution of which involves the aplication of great principles which but seldom pass in review before the judicial tribunals of this or any other country.

On the 19th day of January, 1838, the general assembly of the State of Tennessee passed an act, entitled "An act to establish a State Bank, to raise a fund for internal improvement, and to aid in the establishment of a system of education," by which was created a body corporate and politic, by the name and style of "The Bank of Tennessee," with a capital of five million dollars, which, upon the happening of certain contingencies, should be increased.

By section 12 of said act of incorporation it is provided, "That the bills or notes of the said incorporation, originally made payable, or which

shall have become payable on demand, in gold or silver
60 coin, shall be receivable at the treasury of the State, and by all tax collectors and other public officers, in all payments for taxes or other monies due to the State."

The provisions of this section were expressly repealed by an act passed in 1865, ch. 36, sec. 33. This, it is admitted, the legislature had the right to do. But it is insisted by counsel for the plaintiff in error, that section 603 of the code, which went into effect in May, 1858, operated as a repeal of said 12th section of the bank charter.

The provisions of this section are as follows:

"The collector shall receive, in discharge of public taxes and other dues to the State, besides the constitutional and lawful currency of the United States: 1st. Such bank notes as are current and pasing at par in this State. 2d. Warrants issued by the comptroler. 3d. Certificates from the county court for killing a wild cat, when offered in payment of the poll tax of the person to whom such certificate is given."

By section 41 of the code it is declared: "All public and eneral acts passed prior to the present session of the general assembly, and all public and special acts, the subject whereof are revised in this code, except acts establishing or regulating special courts subject to the limitations, and with the exceptions hereinafter expressed, are hereby repealed."

And by sec. 42 of the code, it is declared: "Local, special,
61 and private acts, and acts of incorporation heretofore passed, are not repealed, unless it be herein so expressed."

It is not insised that the 12th section of the bank charter has been expressly repealed until the passage of the act of 1865, before referred to; but it is argued that the same was by implication repealed by said section 603 of the code.

A legislative intention to repeal an existing statute is never presumed, nor are implied repeals encouraged. Unless the provisions of a subsequent statute be inconsistent with those of a prior statute, it cannot be said that the legislature intended to repeal it. (Smith *vs.* Hickman's heirs, Cooke, 330; Hockaday *vs.* Willson, 1st Head, 115.) Statutes are repealed in whole or in part, by subsequent statutes, when the latter, referring to them, in terms declare the repeal and the extent of it, or when the provisions of the subsequent statute in their operation are inconsistent with or repugnant to the unchanged or unmodified operation of such former statute. In the latter case, the former statutes are repealed, or changed, or modified by the necissary implications of an express intention on the part of the legislature to compass that end, to the extent and in those particulars only in which such inconsistencies or repugnancy exist, and this without any reference even to such former statutes, or any express declaration to that purpose. (Browning *vs.* Jones, 4 Hum., 69.
62 If the statutes are not incompatible with each other, and both can stand and have effect, an implied repeal does not take place, and we must give operation to both. (Cate *vs.* The State, 3 Sneed, 120.)

From these general rules, it is manifest that unless the act of 1858 is inconsistent with or repugnant to the 12th section of the act incorporating the bank, so that both cannot stand, and effect be given to both, the act of 1858 cannot be construed to repeal, by implication, the 12th section of the act of 1838. How is this?

By the latter it is enacted, "that the bills or notes of the said corporation originally made payable, or whch shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes or other monies due to the State."

The act of 1858, which it is insisted repeals the foregoing section of the act of 1838, declares that, besides the lawful currency of the United States, the collecor shall receive, in discharge of public taxes and other dues to the State, such bank notes as are current and passing at par in this State, warrants issued by the comptroler, and certificates for killing wild cats.

This act simply makes it the duty of the collector to receive such bank notes as are current and passing at par, certain warrants, and certain certificates, besides the constitutional and lawful cur-
63 rency of the United States, in discharge of public taxes and other dues to the State, but does not provide that he shall receive nothing else. It can, therefore, stand in perfect harmony with the provisions of the 12th section of the bank charter, and full effect may be given to both, as though they were parts of the same statute.

We are, therefore, of opinion that it it cannot be said section 603 of the code operated as a repeal of section 12 of the act of 1838.

That the legislature itself was of the same opinion, is evident by the fact that, by express enactment, it did declare the said 12th section repealed in 1865.

We come now to the consideration of more important questions.

What effect is to be given to the said 12th section of said bank charter, and to the repeal thereof in 1865?

The caption of the act states the purpose of the act to be "to establish a State Bank, to raise a fund for internal improvement, and to aid in the establishment of a system of education."

By the first section it is declared "that a bank shall be, and is hereby established in the name and for the benefit of the State, to be known unde the name and style of 'The Bank of Tennessee,' and the faith and credit of the State are hereby pledged for the
64 support of the said bank, and to supply any deficiency in the funds hereinafter specifically pledged, and to give indemnity for all losses arising from such deficiency."

And by the second section the whole of the common school fund, whether the same had been invested in bank stock, or was in the hands of the superintendent of public instruction, or of county agents, or other persons, except so much as may have been vested in works of internal improvement, as well as the proceeds of the Ocoee lands, and the surplus federal revenue on deposit with the State, together with the unexpended interest thereon, was constituted a part of the capital stock of said bank.

By section 8 it was provided, among other things, "that of the dividends which shall be declared by the bank, one hundred thousand dollars shall be annually set apart for common schools, and the faith of the State is hereby pledged for an annual appropriation of said amount to common schools, to be applied as the general assembly may direct. Of the dividends of the bank remaining, there shall be annually appropriated for thirty years and no longer, or not so long if the bank should not continue so long in operation, eighteen thousand dollars to county academies, to be applied as the general assembly may direct, and the faith of the State is hereby pledged for the payment of said sum.

These are funds referred to in the first section of the act as "funds hereinafter specifically pledged, and to supply any deficiency in which the faith and credit of the state" were pledged.

The ordinary banking powers and privilages, including the power to issue bills or notes designed to pass as currency, were conferred upon the bank, and for its support the faith and credit of the State were pledged. For certain purposes it was constituted a fiscal agent of the State; and as a means of further aiding in the accomplishment of the purpose of the charter, it was declared that the bills or notes of the bank of certain discription, should be receivable at the treasury of the State, and by all tax collectors and other public officers, in all payments for taxes or other money due to the State.

The bank was organized and went into operation under the provisions of its charter, issued its bills or notes, which were put into circulation as money, and passed currently at par value, and were faithfully and promptly received by the State, in payment of all moneys due it, until the disastrous period in the history of the country, when the bank and its assets were seized by the persons engaged in a hostile armed resellion against the lawful authorities of the government of the United States, who, without authority of law, and for the purpose of aiding the rebellion, removed the same beyond the limits of the State; but for the decision of this case, we do not deem it necissary to express any opinion as to the efect of this treasonable seizure, removal, and appropriation of the assats of the bank, upon its subsequent transactions, or of the untimate liability of the State for its lawful issues, or of the rights of parties under the 12th section of the charter who may have been engaged in that rebellion.

But it is insisted the revenue officers of the State are bound to receive the notes of the bank issued prior to the 6th of May, 1861, in payment of taxes due the State under a contract between the State and the holders of the notes of the bank, and that this is so whether the party offering the same in payment received the notes before or since the repeal of the 12th section of the bank charter, and in support of this position, the case of Woodruff *vs.* Trapnall, 10 Howard, has been cited and relied on.

Whilst that case is like this in some, it is wholly dissimilar in other important features.

The State of Arcansaw braught suit against Woodruff and his securities upon his official bond as treasurer of the State, for the recovery of

a sum of money alledged to have been received by him as treasurer, between the twenty-seventh day of October, 1836, and the 26th day of December, 183. In 1845 a judgment was rendered against Woodruff and his securities. On the 24th of February, 1847, an ex-
67 ecution having issued upon the judgment, Woodruff tendered to Trapnall, the attorney general, the full amount of the judgment, interest and cost, in the notes of the bank of the State of Arkanaw, which were refused.

The bank charter was passed on the 2d of November, 1836, the 28th section of which provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansaw."

On the 10th day of January, 1845, this section was repealed. From this brief statement it will be seen that the indebtedness of Woodruff accrued before the repeal of the 28th section of the bank charter, and while the same was in full force, while the case under consideration, the indebtedness accrued, of the repeal of the 12th section of the charter of the bank of Tennessee.

Judge McLean, in delivering the opinion of a majority of the judges of the Supreme Court of the United States in the case of Woodruff *vs.* Trapnall, said: "It is admitted he (Woodruff) had the notes in his possession at the time he made the tender, and that they were issued by the bank before the repeal of the section, and nothing more than this could be required." But it will be observed that this opinion was based upon the assumption that the 28th section of the charter had the effect of a guarantee, running with the notes, and included all the notes of the bank in circulation, at the date of the re-
68 peal, as clearly as if on the face of every note the words had been engraved: "This note shall be received in payment of debts." While we regard the opinions of the Supreme Court of the United States as of verry high authority, still the force of this opinion is certainly very much weakened by the fact that four out of nine judges, being unable to agree with the majority, delivered dissenting opinions.

A contract is defined to be an agreement between competent persons to do or not to do a certain thing.

The contract in this case was not made with the bank. No franchise was conferred upon it by the 12th section of the charter, and under it the bank could acquire no right.

It was merely a fiscal agent of the State. Then with whom was it made? We answer there was a contract with the bona fide holders of the notes of the bank, lawfully issued, who received them prior to the repeal of the 12th section of the act chartering the bank. The State proposed to receive the notes of the bank from its debtors; but, suppose the bank had put none of its notes in circulation, then, notwithstanding the provision of the 12th section, could it be insisted that any agreement had been entered into between the State and any one, by which the State had contracted to receive the notes of the bank? Certainly not.

The proposition was to persons about to become the holders

69 of the notes of the bank. To them the State said: In order to accomplish the objects of this charter, and in consideration of the benefits which I will derive thereby, if you will give credit to the notes of this bank, and receive them, I will receive them from you in payment of taxes, and other dues; and when, thereupon, the party to whom the proposition is made, in consideration of this promise upon the part of the State, receives the notes of the bank, the contract becomes complete between the State and the party who receives the notes. The consideration moving the State was good and sufficient; but there was no contract whatever between the State and persons who had received none of the notes of the bank.

So long as the 12th section remained upon the statute book unrepealed, there was a continuing proposition upon the part of the State to its citizens; if you will receive the notes of the bank as money, the State will receive them from you in payment of your dues to the State; and if a second party is thereby induced to receive them from the party who received them from the bank, the proposition of the State is thereby accepted by the second holder, and upon its acceptance another contract becomes complete, as between the second holder and the State, by which the second holder of the notes is entitled to discharge his indebtedness to the State in the notes of the bank, not because of any imaginary guarantee upon the part of the State running with the note as a convenant seal running with
70 land, nor because the second holder is substituted to the rights of the first holder, but because, when the proposition of the State to him, that if he will receive the notes as money, it will receive them from him in payment of taxes and other dues, is accepted by the receipt of the notes, a separate, distinct, and independent contract is made; and thus, as long as the proposition is continued, contract after contract springs up between the State and persons into whose hands the notes may successfully pass.

There is no guarantee whatever upon the face of the note, or in any other manner accompanying it. The obligation of the State springs alone out of the statute as it remains in force at the time of the accepance of the notes.

It is conceded in argument the State had the right, at its own pleasure, to repeal the 12th section of the bank charter. This being so, every one into whose hands the notes passed, received them with a full knowledge of the fact, and gave them credit accordingly; and no one can, therefore, complain of a breach of faith upon the part of the State in repealing the section, or of the legal consequence which follow the repeal.

The repeal operated merely as a withdrawal by the State of the proposition, and consequently there could have been no contract between the State and persons into whose hands the notes passed subsequent to the repeal in 1865. The mutual agreement of par-
71 ties, either express or implied, is indefensible to constitute a contract.

The case under consideration is distinguished from the case of Woodruff *vs.* Trapall in at least one important feature.

In the latter case the court said "the entire stock of the bank is owned by the State. It furnishes the capital and receives the profits." How is it in this case? The common school fund, as well as the surplus revenue of the United States deposited with the State under an act of Congress, aproved June 23d, 1836, and constituted a part of the capital of said bank, were trust funds, which the State held merely as a trustee. The surplus revenue was merely a deposit with the State, and for its safe keeping, and to the repayment thereof, from time to time, whenever required by the secretary of the treasusury, the faith of the State stood pledged. The State held the fund known as the common school fund as trustee for the purpose of educating the children of the State, and it was regarded so sacred, that, by art. 11, sec. 10, of the constitution of the State, it is provided as follows: "And the fund called the common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the general assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be deminished
72 by legislative appropriations, and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof, and no law shall be made authorizing said fund to be diverted to any other use than the support and encouragement of common schools."

But enough has already been stated to show, that one of the prime objects of the charter was to so provide that this trust fund should yield a profit, and to apply the same to the purposes of the trust.

It cannot, therefore, be said the capital of the bank belonged exclusively to the State, as did the capital of the bank of Arkansas, or that it received the profits thereof. But it has been argued that the principle of the case of Woodruff *vs.* Trapnall have been recognized and reaffirmed in the cases of Paup, *et al*, *vs.* Drew, and of Trigg, *et al. vs.* Drew, 10th Howard; Curran *vs.* the State of Arkansas, 15th Howard; and Hawthorn *vs.* Calef, second Wallace. The cases of Paup *vs.* Drew and Trigg *vs.* Drew were decided at the same term of the court; the case of Woodruff *vs.* Trapnall was decided, and although in the former, the latter is referred to, we think it may well be doubted whether the conclusions arrived at in the different cases can be harmonized upon the principles of the case of Woodruff *vs.* Trapnall; but, be that as it may, Judge McLean, who also delivered the opinion of the court in the cases of Paup *vs.* Drew and Trigg *vs.* Drew, in the former cases, says: "In the case of Woodruff *vs.*
73 Trapnall, 10th Howard, 190, decided at the present term, this court held that the 28th section in the charter constituted a contract between the State and the holder of the bills of the bank; that the pledge of the State to receive the notes of the bank in payment of debts was a standing guarantee, which embraced all the paper issued by the bank until the guarantee was repealed; and that this construction was founded upon the fact that the bank be-

longed exclusively to the State, was conducted by its officers, and for its benefit."

Although it does not so distinctly appear in the opinion in the case of Woodruff *vs.* Trapnall upon what ground the conclusion in that case was arrived at, still it is distinctly stated by the same judge, at the same term of the court, that the construction given to the contract was founded upon the fact that the bank belonged exclusively to the State, was conducted by its officers, and for its benefit.

Here there is a broad distinction between that case and this. They rest upon different principles; and were we to give that case full weight as conclusive authority upon the questions involved therein, it cannot have the effect contended for in this case, if the case of Paup, *et al vs.* Drew is to be regarded as authority.

In the case of Curran *vs.* the State of Arkansas, 15th Howard, the charter of the bank contained a pledge or assurance, that certain funds deposited therein should be devoted to the payment of its debts,
These funds were withdrawn by acts of the legislature; a bill
74 was filed against the State of Arkansas, the bank of the State of Arkansas, and the officers of the bank, by a creditor of the bank. The court held that the pledge or assurance constituted a contract with the creditors, and that the acts of the legislature withdrawing these funds were void, as impairing the obligation of the contract.

The case in 2 Wallace, relied on in argument, sustains the opinion of the court in the foregoing case, and also in the case of Woodruff *vs.* Trapnall, as it was understood in the case of Paup *et al vs.* Drew. We do not conceive that any of these cases conflict with this opinion.

In the case of Curran *vs.* the State of Arkansas it is said, "That a State by becoming interested with others in a banking corporation, or by owing all the capital stock, does not impart to that corporation any of its privileges or prerogatives; that it lays down its sovereignty so far as the transactions of the corporation are concerned, and exercises no power or privilege in respect to those transactions, not derived from the charter, has been repeatedly affirmed by this court."

But the transactions of the corporation do not form the subject-matter involved in this controversy, and the question here is not, to what extent is the State liable, because of its interest in the banking corporation, but it is to what extent is it bound by an act of the legislature
which provides that the notes of the corporation shall be
75 receivable by the State in payment of taxes and other dues.

The provisions of the 1st section of the bank charter, by which the faith and credit of the State are pledged for the support of the bank, can exercise no influence in determining the rights of the petitioners in this application. The question as to the ultimate liability of the State for the issues of the bank cannot be determined in this proceeding, or in any proceeding between the parties now before the court.

We regard it as well settled that a State can no more impair the obligation of its own contract by legislation, than it can impair the

obligation of contracts between individuals, and that all legislation, the effect of which is to impair the obligation of a contract, is unconstitutional and void.

But the question whether there was a contract between the State and the petitioners in this case, must be determined by the same rules which would determine a similar question between individuals, and when the fact of the contract is once ascertained, the action of a soverin State should be characterized by a more scruplus regard to justice, morality, and promptness, than belong to the ordinary transactions of individuals.

But what contract between the State and the petitioners was impaired by the repeal, in 1865, of the 12th section of the bank charter? We answer, none. They do not aver that at that time they were the bona fide holders of the notes of the bank, which
76 they have since tendered in the payment of taxes due the State.

It has been insisted that to hold the debtor to the State, has the right to pay his debts in the issues of the bank, when they are greatly below par, would be equivalent to holding that a legislature has the power to tie up or destroy the revenues of the State, so as to defeat the ends of the government itself. We do not think so. While it is true that, while on questions of general policy, one legislature cannot bind those which shall succeed it, still, one legislature may undoubtedly make a contract which shall bind those that shall come after it. No one will question the general power of the legislature to declare, by law, in what the revenues of the State may be paid; this, however, is under the controll of the legislature, and may be changed at any time.

The power to levy taxes is a power belonging to sovereignty, which can never be exhausted as long as sovereignty itself continues, the exercise of which is regulated and restrained by the discretion of the legislature. As a matter of necesity, the right to exercise this power must be lodged somewhere; and with this right we must confer a confidence that it will be exercised solely with a view to the accomplishment of the legitimate purposes of revenue.

Suppose it was necessary, to carry on the affairs of the government, that the sum of one million dollars of par funds be raised by
77 taxation, and that there was one million dollars of the issues of the Bank of Tennessee in circulation which was worthless, and which the holders had the right to pay in discharge of their taxes; looking to these facts, the legislature certainly would have the right as it would be its duty to levy taxes with a view to the raising two millions of dollars of revenue, thus raising a sum sufficient to meet the expences of the government, over and above the amount of worthless paper which the State might be bound to receive.

Upon the question whether a bona fide holder of the notes of the bank, who received the same prior to the repeal of the 12th section of the charter, has or has not the right to pay taxes which have accrued to the State since the repeal, we express now no opinion.

We are satisfied that to entitle a party to pay his taxes in the notes

of the bank, they must have been lawfully issued, and such person must have become the bona fide holder of such notes before the repeal of the 12th section of the charter.

The petition in this case does not aver that the notes tendered had been lawfully issued, or, in other word, that they were the legitimate issues of the bank, and that Furman, had become the bona fide holder of the notes prior to the repeal.

We are, therefore, of opinion the judgment of the circuit
78 court, overruling the demurrer to the petition, was erroneous and must be reversed. The demurrer will be allowed, and the petition dismissed.

HAWKINS, *Judge.*

79 *Judgment of the supreme court.*

P. L. NICHOL, clerk, &c., plaintiff in error,
vs.
FRANCIS FURMAN and FRANK W. GREEN, defendants in error.

This cause came on to be heard on this, and on a former day of the the present term, before the honorable the supreme court of the State of Tennessee, upon a transcript of the record from the circuit court of Davidson county, and upon argument of council, whereupon, the court being of opinion that there is error in the judgment of the court below, in overruling the demurrer in this cause, doth order and adjudg that the said judgment be reversed and the demurrer sustained, and the petition dismissed, and that the defendants in error, Furman and Green, pay the costs of this cause, for which execution may issue.

80 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of Tennessee, the same being the highest judicial tribunal in the said State, and the court of the last resort for the correction of errors in all suits, both at law and in equity, in all the inferior courts of said State, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea and suit, which is in said supreme court, for the correction of errors and the final decision of all suits from the inferior courts of said State, before you, between Furman, Green & Co., and P. L. Nichol, clerk of the county court of Davidson county, and collector of the State taxes levied upon merchants, a manifest error has happened, to the great damage of said Furman, Green & Co., as by their complaint appears, and it being fit that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law, and the custom of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 1st day of March, in the year of our Lord 1867, and of the independence of the United States the ninety-first.

[L. S.] E. R. CAMPBELL,
Clerk of the Circuit Court of the United States
for the Middle District of Tennessee.

[50-ct. U. S. int. rev. stamp, cancelled.]

Endorsed: Furman, Green & Co., plts. in error, *vs.* P. L. Nichol, deft. in error. Writ of error from sup. ct. U. S. to sup. ct., Tenn.

81 *Copy of the writ of error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of Tennessee, the same being the highest judicial tribunal in the said State, and the court of the last resort for the correction of errors in all suits, both at law and in equity, in all the inferior courts of said State, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea and suit which is in said supreme court, for the correction of errors, and the final decision of all suits, from the inferior courts of said State, before you, between Furman, Green & Co., and P. L. Nichol, clerk of the county court of Davidson county, and collector of the State taxes levied upon merchants, a manifest error has appeared to the great damage of Furman, Green & Co., as by their complaint appears, and it being fit that the error, if any has been, should be duely corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and
82 according to law, and the custom of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said upreme Court of the United States, this 1st day of March, in the

year of our Lord 1867, and of the independence of the United States the ninety-first.

E. R. CAMPBELL,
Clerk of the Circuit Court of the United States for the Middle District of Tennessee.

83 United States of America, to P. L. Nichol, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, at Nashville, wherein Furman, Green & Co. are plaintiffs, and you are defendant, to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, Sam. Milligan, presiding judge of the said supreme court of Tennessee, this 1st day of March, in the year of our Lord 1867.

SAM. MILLIGAN,
Presiding Judge of the Supreme Court of the State of Tennessee.

Endorsed: Furman & Green & Co. *vs.* P. L. Nichol. Citation. Copy of this citation delivered to P. L. Nichol, def't, and this original shown to him, this March 6th, 1867. J. N. Alexander, dpt. sh'ff., &c. Sworn to and subscribed before me, on the same day, March 6th, 1867. Jesse G. Frazer, clerk of the sup. court of Tennessee. Citation.

84 *Copy of Citation.*

United States of America, to P. L. Nichol, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to writ of error filed in the clerk's office of the supreme court of Tennessee, at Nashville, wherein Furman, Green & Co. are plaintiffs, and you are defendant, to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should no be done to the parties in that behalf.

Witness, Sam. Milligan, presiding judge of the said supreme court of Tennessee, this 1st day of March, in the year of our Lord 1867.

SAM. MILLIGAN,
Presiding Judge of the Supreme Court of the State of Tennessee.

85 FURMAN, GREEN & Co., *vs.* P. L. Nichol.

Know all men by these presents, that we, Furman, Green & Co., and Wm. H. Evans, are held and firmly bound unto the above-named P. L. Nichol in the sum of one thousand dollars, to be paid to the

said P. L. Nichol, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated this 1st day of March, 1867.

Whereas, the above-named, Furman, Green & Co., have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the supreme court of Tennessee;

Now, therefore, the condition of this obligation is such, that if the above-named Furman, Green & Co., shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

Signed, sealed and delivered in presence of—

FURMAN, GREEN & CO.
WM. H. EVANS.

Edorsed: Furman, Green & Co., *vs.* P. L. Nichol. Bond to prosecute writ of error. This bond being satisfactory to me, I approve it. Sam. Milligan, presiding judge of supreme court of Tennessee. Appeal bond.

Copy of appeal bond.

86 FURMAN, GREEN & CO. } *vs.* P. L. NICHOL. }

Know all men by these presents, that we, Furman, Green & Co., and Wm. H. Evans, are held and firmly bound unto the above-named P. L. Nichol, in the sum of one thousand dollars, to be paid to the said P. L. Nichol, his executors or administrators, to which payment well and truely to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated this 1st day of March, 1867.

Whereas, the above-named Furman, Green & Co. have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the supreme court of Tennessee;

Now, therefore, the condition of this obligation is such, that if the above-named Furman, Green & Co., shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

Signed, sealed and delivered in presence of—

FURMAN, GREEN & CO.
WM. H. EVANS.

Writ of error.

UNITED STATES OF AMERICA:

87 The President of the United States of America, to the judges of the supreme court of Tennessee, the same being the highest judicial tribunal in the said State, and the court as the last resort for the correction of errors in all suits, both at law and in equity, in all the inferior courts of said State, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea and suit which is in said supreme court, for the correction of errors and the final decision of all suits from the inferior courts of said State, before you, between Furman, Green & Co., and P. L. Nichol, clerk of Davidson county court, collecor of the State taxes levied upon merchants, a manifest error has appeared, to the great damage of the said Furman, Green & Co., as by their complaint appears, and it being fit that the error, if any has been, should be duly corrected, and full and speady justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings afore-
88 said being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and awarding to law the custom of the United States should be done.

Witness, the Honorable Solomon P. Chase, Chief Justice of the said Supreme Court of the United States, this 1st day of March, in the year of our Lord 1867, and of the independence of the United States the ninety-first.

E. R. CAMPBELL,
Clerk of the Circuit Court of the United States
for the Middle District of Tennessee.

89 *Order of Supreme Court granting appeal.*

P. L. NICHOL, clerk Davidson county court,
vs.
FURMAN, GREEN & CO.

From the judgments in this cause, the defendants in error, prays for a writ of error to the Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, and having produced a writ of error and given bond and security, which have been allowed according to the act of Congress, and also lodged a copy of said writ of error, and the original citation, a copy of which has been served and proved;

It is ordered that the original writ of error and citation, with a copy of the record in this cause, be made out by the clerk of this court, and transmitted to the Supreme Court at Washington. He will also transmit a copy of the charter of the Bank of Tennessee, of 1838, the act June 1865, repealing the twelfth section of the bank charter, and a copy of the opinion of this court.

Office of the clerk of the Supreme Court for the middle division of the State of Tennessee:

I, Jesse G. Frazer, clerk of said court, do hereby certify that the foregoing is a true and complete transcript of the record in the case of Furman, Green & Co. *vs.* P. L. Nichol, clerk, &c., as appears of record and is now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court, at office in the capitol at Nashville, on this the 29th day of March, 1867, and of the independence of the United States the ninety-first year.

[SEAL.] JESSE G. FRAZER, *Clerk.*

10 How 256

Supreme Court of the United States.

DECEMBER TERM, 1868.

FURMAN, GREEN & CO.,

vs.

P. L. NICHOL.

ARGUMENT AGAINST THE MOTION TO DISMISS THE WRIT OF ERROR.

ROBERT L. CARUTHERS,
For Plaintiff in Error.

Judd & Detweiler, Printers, 517 Seventh St., near D.

Supreme Court of the United States.

DECEMBER TERM, 1868.

FURMAN, GREEN & CO.,

vs.

P. L. NICHOL.

ARGUMENT AGAINST THE MOTION TO DISMISS THE WRIT OF ERROR.

The question is whether the court can take jurisdiction of this case under that clause of the 25th section of the Judiciary act of 1789, which gives a revisory power over the State courts.

From the vast number of decisions on this provision it would seem that the construction must be settled by this time. Yet the question seems to be renewed almost every term, even at this late day.

While this court has ever manifested a disposition to avoid the assumption of jurisdiction over the State courts, where it is not given expressly, or by necessary implication, it has always regarded it as a solemn duty to interpose in the cases designated by the law. This is certainly a very important branch of its jurisdiction. Without it, the Constitution and laws of the United States would not be the "supreme law of the land." There would be no uniformity in their construction and application without this revisory power.

All this being admitted, the question arises, is this case so presented as to give jurisdiction? It is most clearly, as we think, and will try to show.

1. *What is the rule?* In the case of Crowell *vs.* Randell, 10 Peters, 368, Justice Story, upon a review of all the previous

cases, states it thus, in substance, that some one of the cases embraced in the 25th section arose, and was decided as required therein, but "that it was not necessary that the question should appear on the record to have been raised, and the decision made, in direct and positive terms, *ipsissimis verbis*, but it is sufficient if it appears by clear and necessary intendment that the question must have been raised and decided in order to have induced the judgment."

In the case of Armstrong *ex.* The Treasurer of Athens County, 16 Peters, 281, Judge Catron, after remarking upon the evils resulting from the uncertainty of the principle on which the court was governed in the construction of the 25th section, states it thus: "either by express averment, or by *necessary intendment* in the pleadings in the case, it must appear from the record that the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed without deciding it."

The last case in which the question came before the court, and was decided upon full argument, and upon the examination of the previous cases, was that of The Bridge Proprietors *ex.* Hoboken Co., 1 Wallace, 143, as late as 1863. His Honor, Justice Miller, after reviewing the cases, says:

"Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular part of the Constitution supposed to be infringed by the State law, ought to be pointed out, it has never been held that this should be done by express words. *But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.*"

May we not say, in the language of this court in the last case, "Looking at the record before us, and applying to it these principles, we find no difficulty in the matter," as to the jurisdiction.

What is the case as it appears in the record? By the laws of Tennessee it was made the duty of the defendant, Nichol, as clerk of the county court of Davidson, and collector of the taxes on

merchants and privileges, to issue a license to any one or more, who might desire to follow the business of selling goods in his county for one year, upon the execution of a bond to give an account of the quantity sold at the end of the year, and pay the per cent. levied upon the invoice cost of the same. The amount of sales thus ascertained would show the taxes to be paid to the State. This the law required to be done before the license could be renewed. Furman had, in conformity with the law, taken out license on the 28th August, 1865. On the 1st of August, 1866, twenty-eight days before the expiration of his time, he took Green into partnership, and intended to carry on the same business, in the firm name of Furman, Green & Co. This change from an individual to a partnership concern, on the addition of a partner since the issuance of his license, made it necessary, under section 703 of the Code, that, although his time had not expired, he should appear before the clerk and report, and settle up for the goods sold, and take out a license to the new firm. To do this it was necessary to pay up the amount due to the State for past sales, and enter into a bond in the name of the firm, to account again at the end of the next year. The law requires nothing to be paid in advance, except only a fee to the clerk.

It appeared that there was due from Furman to the State, as a tax on the amount sold by him up that time, one year, less twenty-eight days, $3,535. This had to be paid before he could get license for the new firm. The firm tendered their bond, with surety, as required by the Code, to which no objection was made, and Furman tendered the $3,535 due from him in the notes issued by the Bank of Tennessee before the secession of the State, May 1st, 1861. These the clerk refused to receive, because they were under par, and demanded the national currency, insisting that there was no law then in force requiring him to receive any other than par funds. Consequently he refused to issue license to Furman, Green & Co., whereupon a petition was presented to a circuit judge to compel him to do his duty in the premises.

These facts are stated in the petition, and the 12th section of

the charter of the Bank of Tennessee relied upon as a contract between the State and the holders of said notes, that they should be received for all dues to the State. The charter is made a part of the petition. It is charged in the petition that the State had no power by any subsequent act of her Legislature, to "impair or annul the validity or binding force of said contract." This is certainly a sufficient reference to the clause in the Constitution on which petitioners rely, as well as the act of repeal alleged to be in conflict with the same. By the demurrer all the facts stated are admitted as fully as if it was done by answer or case agreed. The demurrer on page 7 of the Record rests the defence upon two grounds, which are in substance:

1. That the petition does not show any contract between the State and the *petitioners*, that said notes should be taken from *them* for taxes.

But the petition states on page 3, "That said charter was a contract made with the people of the State, *and every person* into whose possession the said notes and issues might come, that the same should be received by all collectors of taxes, and for all dues to the State of Tennessee." Is not that sufficient, with the previous statement that $3,535 of the notes had come to the hands of petitioner, and were then tendered to the clerk? This looks more like a quibble than a solid objection to the sufficiency of the petition. But as this agreement is pressed in the brief on the other side, I consider it proper to notice it. But surely it is without force as an argument.

The *second* cause of demurrer also relates to the alleged insufficiency of the facts stated in the petition. 1st. It is not charged that plaintiffs became the holders of the notes tendered, before the act of 1858, ch. 5, art. 2, of the Code. 2d. It does not state that they became holders of the notes before the "repeal of the charter of the Bank of Tennessee, in 1866." It will be seen by the brief on the other side, as well as all the facts in the case, that reference is here made to the act of June, 1865, repealing the 12th section of the charter of 1838. There was no act in 1866 repealing the charter or any part of it, nor was it ever repealed, except only the 12th section. So I am constrained to

admit that this is simply a mistake in dates. So, it will be seen, that this ground of demurrer is based upon the idea that the contract of the State, by virtue of the charter, existed with those only who might happen to have the notes in possession at the time she withdrew her guaranty, by the repeal of the 12th section, in 1865. This is of course an admission on the record and in the argument, that the contract bound her as to those who then held them. Such was the opinion, and the ground of decision of the court below, as will be seen by reference to the Record, between pages 25 and 36.

Now, can it be doubted by any one, even without looking to the opinion of the court, but only to the Record proper—to the pleadings alone—that the question involved in the case, and the one decided by the court, and which they would be bound to decide to reach the result, was that the act of 1865, repealing the 12th section of the act of 1838, was not in conflict with the clause in the Constitution which forbids any State to pass a law impairing the obligation of contracts? That was the only question raised by the pleadings. The court necessarily decided it in favor of the repealing act, in sustaining the demurrer, and dismissing the petition. The demurrer, in legal effect, admits that the petition shows a case of contract between the State and those who held the notes at the time of repeal, but insists that it does not extend to those who received them after that time; that as to the latter there was no contract to be impaired, and consequently they are not saved from the operation of the State act by the Constitution. But the law is well settled by repeated decisions of this court, beginning with Woodruff *vs.* Trapnall, 10 How., 180, that the contract goes with the notes issued before the repeal, into whomsoever hands they may come, without regard to the time they were received, whether they were held at the time or after the repeal of the guaranty. That point is too firmly settled to be open to argument. At page 206, (10 Howard,) the court says:

"It is argued that there could have been violated or impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him in possession at the time the

28th section was repealed. It is admitted he had the notes in possession at the time he made the tender, and that they were issued by the bank before the repeal, and nothing more than this could be required."

Then it would seem to be manifest, from the facts stated in the petition, and the points made in the demurrer, by "necessary intendment," that the case drew in question the clause referred to in the Constitution, and was decided against its aplication and in favor of the validity of the repealing act of the State, thus making the exact case designated in the 25th section.

The opinion of the court is explicit. But without reference to that, the same must appear from the pleadings in the case by necessary intendment, if not expressly. The case made in the petition, aided by the points or grounds of demurrer, leaves no room to doubt that the question raised and decided was none other than the constitutionality of the act of repeal, and the decision in favor of its validity, as against the plaintiffs in violation of the contract with the State to receive the notes for taxes.

Was there any other ground according to the record upon which the State court could have decided the case against the plaintiffs but the one stated; that is, that the contract created by the act of 1838 between the State and the noteholders was not impaired, as to the plaintiffs, by the act of 1865? It is argued that there are other grounds besides the one which brings them in conflict with the Constitution, on which the court may have decided as they did.

First. It is contended that the case presented questions of construction of the two acts, and not of the validity of either. The same position was assumed in the case in 1 Wallace, and is disposed of by the court on page 144. In that case this court, as well as the State court, so construed the act of 1790, admitting it constituted a contract between the State of New Jersey and the Bridge Company as to produce no violation of the same by the act of 1860. Yet as it was a contract, and the plaintiffs claimed that it was impaired by the latter act, it made a case under the 25th section for the jurisdiction of this court. Even in that case the court say, "this court will not be

discharging its duty to see that no State Legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

But without this authority, the position would be palpably untenable. The State court so construe the act creating the contract as to exclude the petitioners from its benefits, and upon that construction hold that the act complained of does not affect them, or deprive them of any constitutional rights, as they had no contract with the State. Surely this cannot be held to be sound doctrine, if there had been no authority against it. I conceive that both acts are plain, and susceptible of but one construction in view of the authorities cited. It follows then, that the court below has given an effect to the act of 1865, by which the obligation of the contract between the State and the plaintiffs under the act of 1838, is impaired.

Secondly. It is insisted that the court below might have given the judgment they did upon the ground that the 12th sec. of the act of 1838 was repealed, by implication, by the Code in 1858, and the petition did not state that the notes tendered were issued before that time. That could not be possible, as the same Code provided, in section 42, that acts of incorporation, and the charter of the Bank of Tennessee was of course one of them, were not repealed. Nor would any lawyer, much less an intelligent court, place such a construction upon sec. 603 of the Code, as to make it the ground of the decision made below. In justice to that court I would invite an inspection of their opinion, at pages 28–9 of the Record.

Thirdly. It is *suggested* in the brief on the other side that as the Code, in section 703, required Furman, on such an application as this, not only to pay the amount of revenue then due from him under the old license, but to surrender it to the clerk, and "take out a new license as an original applicant," the petition may have been dismissed for the failure to state he had done that. But surely it cannot be for a moment imagined that the Supreme Court of Tennessee would pass a judgment dismissing the petition of the plaintiffs, because the old license was not surrendered when the defendant refused to issue a new one, because the taxes

of the preceding year were not paid, or proposed to be paid in funds that he would accept. The defendant made no such objection to the application. The time had not come to make a surrender of the old license. There was no such question in the case, and it is unjust to the State court to suppose that it were even possible for them to base an important judgment upon such a ground.

It would seem to be impossible, upon the examination of this case, to entertain any doubt as to the ground upon which it was decided below. And there is just as little doubt that this ground was that the repealing act of 1865 was valid and effectual to deprive the plaintiffs of the benefit of their contract with the State under the act of 1838, to pay the notes of the Bank of Tennessee for the taxes due from them to the State. In this we say there is error which this court has power, and is bound in duty to correct.

It is not controverted, nor could it be, that the practice adopted in this case to bring up the questions made, is not a proper one under the laws of Tennessee. So, there is no pretence that the judgment of dismissal was for want of jurisdiction, or the resort to an improper remedy.

To be sure, the questions might have been made in a proceeding against the plaintiff for the taxes due, or the penalty for selling goods without license, or by payment of the taxes under protest. But the petition for a mandamus seemed to be the cheapest, most speedy, and convenient mode of settling the rights of the parties. But still it has been two years and a half since this proceeding was instituted. Such is the law's delay.

I will be excused by the court for urging the importance to the state, and the citizens of Tennessee, that the question involved in this case should be decided as soon as practicable. There are a considerable number of cases in the courts of the State waiting the event of the decision in this, and many more will continue to be brought until the law is settled.

The circuit courts in the two principal commercial cities of the State—Nashville and Memphis—have held the State bound to receive this paper for taxes, and the Supreme Court in this

case has held the other way. Amidst this uncertainty as to the duty of the State and the rights of the citizens, the two or three millions of the notes of the Bank of Tennessee which are outstanding, are either locked up or made a subject of speculation by brokers and money changers, to the great detriment of the people. Under these circumstances this court would not feel inclined to avoid a decision upon the merits upon mere technicalities. If the State is bound to receive this paper for taxes the Legislature is now in session, and can adopt such measures as may be necessary to raise sufficient revenue for the support of the State government.

ROBERT L. CARUTHERS,
For Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1867.

FURMAN, GREEN & CO., PLAINTIFFS IN ERROR,

vs.

P. L. NICHOL, CLERK OF THE COUNTY COURT OF DAVIDSON COUNTY, TENNESSEE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF TENNESSEE

ARGUMENT OF HORACE H. HARRISON,

FOR DEFENDANT IN ERROR,

ON MOTION TO DISMISS THE WRIT OF ERROR.

Supreme Court of the United States.

DECEMBER TERM, 1868.

FURMAN, GREEN & CO., PLAINTIFFS IN ERROR,

vs.

P. L. NICHOL, CLERK OF THE COUNTY COURT OF DAVIDSON COUNTY, TENNESSEE, DEFENDANT IN ERROR.

ARGUMENT UPON THE MOTION TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION, &C.

The writ of error in this cause being to a State Court, the jurisdiction of this court to review the cause depends upon whether or not there was drawn in question the validity of the act of 1838, chartering the Bank of Tennessee or the validity of the act of 1865, repealing the 12th section of said act of 1838, upon the ground of said acts or either of them being repugnant to the provisions of the Constitution of the United States, and whether the decision of the State Court was in favor of its or their validity.

If the validity of neither of these acts, upon the ground of such repugnance, was drawn in question in the Supreme Court of Tennessee, or if the validity of neither was drawn in question *and neither of these acts decided by that court to be valid*, in either case the writ of error ought to be dismissed.

It is not sufficient that one of the questions in the 25th section of the judiciary act *might* have arisen and been actually decided (Williams *vs* Oliver 12 Howard, 111, 6 Wallace, 382, same 632.) Nor does error lie to a State Court on the ground of an alleged violation of the Con-

stitution, unless it appear by the record that the point was raised in the State Court; that the party called attention to the particular clause of the Constitution relied upon, and to the right claimed under it, and that the point thus distinctly raised was ruled against him. (1 Black, 350, same, 518.) Even if this strict and very correct ruling, is at all modified in the case in 1 Wallace, 115, still, as it is laid down in that last named case, the pleadings must make a case which necessarily comes within the provisions of the Constitution.

The intention of the parties to raise a constitutional question is not enough; it must be actually raised and decided.

Mathewson *vs* Br. B. K. of Mobile, 7 How., 200.

It will not be contended that either the act of 1838, or the act of the 16th February 1866, was drawn in question in the Supreme Court of Tennessee upon the ground of repugnance to the Constitution. If the jurisdiction of this court is sustained at all under the 25th section of the act of Congress of 1789, it must be upon the ground that the act of 1865, repealing the 12th section of the act of 1838, was drawn in question on the ground of its repugnance to the provisions of the Constitution of the United States, and the decision of the said State Court was in favor of its validity. This was not the case as the following statement of the question made, and the decision thereon in the State Court, will show.

The plaintiffs in error, in their petition to the Circuit Court of Davidson county Tennessee, brought against the defendant in error to compel the latter as a collector of taxes due the State of Tennessee to receive from plaintiffs in error the notes and issues of the Bank of Tennessee tendered, issued prior to the 6th of May 1861, and under the provisions of the 12th section of the act of the Legislature of Tennessee, passed 19th January 1838, chartering said

bank, made their allegation or statement in the following words, after setting forth the tender to defendant in error, the charter of said bank and particularly the provisions of the 12th section of said charter, and the refusal of defendant in error as a collector of taxes, to receive the issues of said bank tendered to him, and to issue to them a license viz: "That said charter was a contract made with the people of the state, and every person into whose possession the said notes and issues of said bank might come, that the same should be received by all collectors of taxes and in payment of all dues to the State of Tennessee, and it is not in the power of the Legislature of the said State of Tennessee, to impair or annul the validity and binding force of said contract."

Printed record, pages 3 and 4.

There is, as will be noticed, no allegation or statement in the record by plaintiffs in error, that there was a contract between the State and the plaintiffs in error, *or that the State or its Legislature had impaired or by any act impaired or attempted to impair the obligation of such contract.*

The special demurrer of the defendant in error and the joinder therein, makes the issues of law upon the matters alleged in the petition in the following causes of demurrer assigned.

First. That the petition fails to show that there was a contract between the State of Tennessee and petitioners; that the notes of the Bank of Tennesse held by petitioners, should be received in payment of taxes due to the State of Tennessee from petitioners.

Second. That they have failed to show in their petition that they became the holders of said notes, the issues of the Bank of Tennessee, before the passage of the act of 1858, to revise the statutes of Tennessee, title 4, cap, 5 art. 2 of the code of Tennessee, or that they became the

stitution, unless it appear by the record that the point was raised in the State Court; that the party called attention to the particular clause of the Constitution relied upon, and to the right claimed under it, and that the point thus distinctly raised was ruled against him. (1 Black, 350, same, 518.) Even if this strict and very correct ruling, is at all modified in the case in 1 Wallace, 115, still, as it is laid down in that last named case, the pleadings must make a case which necessarily comes within the provisions of the Constitution.

The intention of the parties to raise a constitutional question is not enough; it must be actually raised and decided.

Mathewson *vs* Br. B. K. of Mobile, 7 How., 200.

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Second. That they have failed to show in their petition that they became the holders of said notes, the issues of the Bank of Tennessee, before the passage of the act of 1858, to revise the statutes of Tennessee, title 4, cap, 5 art. 2 of the code of Tennessee, or that they became the

holders of said notes before the passage of the act repealing the 12th section, of the charter of the Bank of Tennessee, passed in 1865.

So there was no question made as to the *validity* of the act of 1838. Plaintiffs in error themselves *must* have claimed that that act was valid, for the very contract, if there was any such contract, was made by, or grew out of that act.

Was the *validity* of the act of 1865, repealing the 12th section of the charter of the Bank of Tennessee drawn in question upon the ground, that said act of 1865 was repugnant to the Constitution of the United States, and was that act of 1865 declared to be valid by the Supreme Court of the State of Tennessee, *or* do the pleadings make a case which necessarily comes within the provisions of the Constitution?

This court will see upon an inspection of the record that the main question in the cause in the court below was, upon a construction of the act of 1838, as to whether there *was any* contract contained in or arising out of the 12th section thereof, as contended for by the plaintiffs, and as to the *legal effect* of plaintiffs in error taking the bank issues tendered, *after* the act of 1858 and the act of 1865.

If, upon construing the act of 1838, it was seen that there *was* such a contract, then the State Court, (if the pleadings necessarily involved the question,) would have found it necessary to decide whether the act of 1858 or the act of 1865 impaired such contract, or in other words, to decide upon the validity of these acts. This the State Court did not do, for as that court held upon a construction of the act of 1838, that there *was no* contract as claimed, it follows that the act of 1865 was not even construed. Certainly its validity was not drawn in question or decided. As to the question raised by the demurrer as to the act of 1858, that will be noticed hereafter. The decision of the State Court was a decision upon the construction of the

effect of the statute of 1838, 12 section, and not upon the validity of *any* statute.

Where a state law is admitted to be valid, and the only question is whether it has been correctly construed, the Supreme Court has no jurisdiction.

5 Howard, 317.
12 Howard, 165.
14 same, 149.
16 same, 106.
2 Black, 574.

The cases in 1 Wallace, 116, and in 3 Wallace, 51, do not reach the principle in the matter of objection to the jurisdiction of the Supreme Court in this cause. In the former it was held, that if a state law create a contract, and a subsequent statute be alleged to impair its validity, and the State Court so construe the former that the latter does not impair it, the validity thereof is drawn in question and error lies. In the latter it was held that if a party set up that under one statute, the State made a contract with him, and that by a subsequent act, it violated that contract, and in the State Court the latter act is held to be valid, the jurisdiction of the Supreme Court attaches.

These rulings do not reach the principle involved in the question of jurisdiction in this cause, for the following reasons.

First. It cannot be assumed in deciding the question of jurisdiction, that the act of 1838, did create a contract with plaintiffs in error, and, upon that question, as to whether it *did* create such a contract, it was decided upon a construction of the effect of the statute, that it did *not*; and this is the only question decided, or which it was necessary to decide, in this cause, in the State Court.

Second. Plaintiffs in error, did not allege that the statute of 1865, *or any other statute*, impaired the obligation of the contract set up by them as having been made

"by the people of the State, and every person unto whose possession the said notes and issues of said bank might come, &c."

Third. The State Court did not so construe the act of 1838, that the act of 1865 did not impair its validity unless it may be said that holding that the act of 1838, (12th sec.,) did *not* create the contract insisted upon, that that was such a construction as amounted to a decision, that the act of 1865 did not impair its validity.

Fourth. The plaintiffs did *not* set up that under the act of 1838, the State made a contract with them, and that by a subsequent act, the State violated that contract; the only allegation made by them being the loose, uncertain, indefinite and sweeping one found on page 3 (bottom) and page 4 (top) of the printed record, hereinbefore referred to.

I call the attention of the court, (if deemed necessary to refer to authorities upon a question, which must be so familiar to the court,) to the following cases (10 Peters, 368, 12 Peters, 507, 13 Peters, 157, 14 Peters, 56, 15 Peters, 18, 5 Howard, 317, 18 Howard, 511, 4 Wallace, 177,) from which are extracted the following points. That to give jurisdiction to the Supreme Court, to review the judgment of a State Court it must appear:

(1.) That some one of the questions stated in the judiciary act did arise.

(2.) That the question *was* decided by the State Court as required by that section.

(3.) It is sufficient if it appear by *clear* and necessary intendment *from the record*, that such question must have been raised and decided.

(4.) It is not enough that such question *might* have arisen, or been applicable; it must appear that it *did* arise and was applied.

And I refer, also, to the following late cases as being

conclusive, against the jurisdiction claimed for this court in this cause.

In Farney vs. Towle, 1 Black, 350, it is held that it must appear *by the record*, (and the opinion of the State Court is no part of the record, 12 Wheaton, 117, 6 Wallace, 148,) that the point was raised and decided in the State Court, and that it was not sufficient that a statute was charged in general terms to be unconstitutional and void, but the attention of the State Court must have been directed to the particular clause of the constitution of the United States, on which the party relied. The same principle was announced in the case of Shelden vs. Hoyt, 1 Black, 518. In that case like the present, there was nothing in the record to show that any section or clause of the Constitution of the United States was brought to the attention of the State Court. In Bridge Proprietors vs. Hoboken Co., 1 Wallace, 143, the court modify the rule in the cases above cited only so far as to say that the particular section or clause in the Constitution need not be referred to in express words, but it must appear by necessary intendment that a certain provision of the Constitution or an act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.

The case of R. R. Co, vs. Rock, 4 Wallace, 177, supports the position that it must appear from the record, that a question embraced in the 25th section of the judiciary act must have been made and decided as therein provided, and that it was not enough that the questions were argued by counsel, and decided by the State Court, if its decision could be sustained on any other ground. And it seems from that case that even where the fact that the validity of a certain section of the State Constitution of Iowa was certified by the presiding Judge to have been drawn in question, it was not deemed sufficient to support the jurisdiction of this court.

In the case of The Victory, reported in 6 Wallace, 382,

and in Hamilton Co., *vs.* Massachusetts, 6 Wallace, 632, this court reiterate the principle that it is not sufficient to show that the question might have arisen in and been applicable to the case, unless it is further shown *by the record* that it *did* arise and was applied by the State Court to the cause. See also 18 Howard 515.

I will, also, further submit to the court whether it will take jurisdiction on an application to compel the State of Tennessee to grant a license for exercising a privilege to the plantiffs in error, especially as they fail to show a compliance, or offer to comply with the *express* requirements of the law of that State, (Sub-sections 1 and 3 of section, 703 of the Code of Tennessee, page 203,) to entitle them to a license to exercise the very privilege asked for.

The plaintiff Furman, had been a licensed wholesale merchant, and received a license from the defendant in error on the 28th of August 1865, for the year then next ensuing: (See printed record, page 2.) He entered into partnership with Green, one of the plaintiffs in error, on the 1st of August 1866, and by the express provisions of sub-sections 1 and 3, of section 703 of the code of Tennessee, before the defendant in error was authorized to issue the license, the issuance of which plaintiffs in error are now seeking to compel by the extraordinary process of mandamus, Furman was bound to go before the clerk of the County Court and make affidavit of the amount on which he was then bound to pay taxes, and pay the same *and surrender the original license*, and Green, the purchaser of the stock or business, unless he was a person already licensed, was compelled at the same time to make a statement on oath of the amount, if any, that had been added by him to the stock or business. (See sub-section 1, of section 703, code of Tennesse.)

This was *not* done nor is it shown that it was offered to be done.

Sub-section 3, provides as follows: "In case a member or members die, retire from, or be added to a licensed

firm, the surviving or remaining partners or new firm shall immediately appear before the clerk of the County Court, *and surrender the original license," etc.* This was not done; and although plaintiffs in error show that the defendant in error refused to issue to them a license because Furman, one of the plaintiffs in error, had not paid the state tax due from him, *in par funds*, yet that does not exclude the idea that even if the state tax had been paid in par funds, the license might have been withheld, and properly withheld, because Furman failed to surrender his original license, and because the newly added member of the firm (who was *not* a person already licensed) failed to make or tender the statement required in sub-section 2, of section 703, of the laws of Tennessee.

And this court cannot, I think, conclude upon this record that there was such a compliance with the laws of Tennessee as would entitle plaintiffs in error to the license. To take jurisdiction in this cause, and by this proceeding, compel the State of Tennessee to issue a license to one of its citizens to exercise a privilege under its laws, and to do this where the plaintiffs in errror do not show beyond any doubt that they have complied with all (even the least) of the provisions of the statutes of Tennessee to entitle them to the license from the State, if the proceeding would be justified at all, I respectfully submit, would be an exercise of the jurisdiction of this court unwarranted either by the practice of this court on the laws regulating its powers as an appellate tribunal, certainly at least doubtful, delicate, not to say dangerous.

On the question of jurisdiction, as I have shown, this court looking alone to the record (excluding the opinion of the court) must conclude that the cause in the Supreme Court of Tennessee may have been decided upon the either one of the causes set down in the demurrer, viz; that there was no contract, or that the plaintiffs in error were not entitled to maintain their petition because they fail to show that they became the holder of the bank issues

prior to the act of 1865, or, lastly, that they were not entitled to maintain their suit because they did not show that they became the holder of said notes, the issues of the Bank of Tennesse before the passage of the act of 1858. In the latter case, if there *was* a continuing guaranty on the part of the State amounting to a pledge to take the issues of the bank tendered by plaintiffs in error, as this guaranty did not extend to the notes issued after the passage of the act of 1858, and as the notes, though issued prior to the 6th of May, 1861, may not have been issued prior to 1858, the State Court, as I am warranted in assuming, by the absence of anything to the contrary in the record, may have sustained the demurrer and dismissed the petition upon that ground.

The judgment of the court was in these words "the court being of the opinion that there is error in the judgment of the court below, in overruling the demurrer in this cause, doth order and adjudge that the said judgment be reversed and the demurrer sustained and the petition dismissed." This court cannot see from the record on what ground the decision of the State Court was based.

HORACE H. HARRISON,
For Defendant in Error.

Washington, D. C.. February 16th, 1869.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, O.

Supreme Court of the United States.

DECEMBER TERM, 1868.

Furman, Green & Co.
Plaintiffs in Error,

versus

Philip L. Nichol (Clerk of Davidson County Court, Tennessee),
Defendant in Error.

Error to Supreme Court of Tennessee.

On Motion to Dismiss for Want of Jurisdiction.

ARGUMENT OF GEORGE HOADLY, for the Plaintiffs in Error.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, O.

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Error to Supreme Court of Tennessee.

Argument of George Hoadly, of Counsel for Plaintiffs in Error, upon motion to dismiss for want of Jurisdiction.

SINCE my argument upon the merits of the case has been printed, I have seen the argument of Mr. Harrison, for the defendant in error, upon his motion to dismiss the writ of error, for want of jurisdiction, and desire now to reply.

For the purposes of this argument, I do not urge that the opinion of the Supreme Court of Tennessee is part of the

record. Whether, under sections 3931 and 3932 of the Code of Tennessee, this opinion may or may not constitute part of the record, need not, as it seems to me, be discussed. I am disposed to concede what is claimed on this subject: and to admit, for the sake of the argument, that we do not know (by the record), on what grounds the Court below actually placed its judgment, and can only speculate as to what they were obliged to decide, and must have decided. It is sufficient to establish the jurisdiction of this Court, if we show that the Supreme Court of Tennessee could not have reached the conclusion and judgment, set out in the record, without sustaining the validity of a statute of Tennessee, or of an authority exercised under that state, impeached by the plaintiffs in error as impairing the obligation of a contract between them and the state. I concede that if Mr. Harrison has shown or can show that the judgment in question can be sustained, upon the pleadings, in the light of the laws of Tennessee, of all which this Court takes judicial cognizance, upon any possible theory, without also sustaining the validity of a law of the state, or of an authority under the state, which we impeached, because of its effect to impair the validity of a contract, his motion must prevail.

What was the case? Mandamus to compel the defendant, who as clerk of the county court was *ex officio* tax collector in the premises, and as such acted by the authority of the state, to take from the petitioner Furman, for state taxes due, $3,535 in notes of the Bank of Tennessee, which by contract the state was bound to receive, and issue to Furman, Green & Co. a license to trade as wholesale merchants, which he had refused to do. It was, therefore, on the face of the petition, an action to enforce the paramount authority of article 1, section 10, of the Constitution of the United States as against a public officer

of the state of Tennessee, exercising authority under the state, and drew in question the validity of his authority on the ground of its being repugnant to the Constitution.

The Code of Tennessee contains the following sections upon the subject of mercantile licenses :

"*Section* 678. Taxable sales of goods shall not be made, by any merchant, without first taking from the clerk of the county court, for each establishment at which his business is to be conducted, a yearly license.

679. An original wholesale or retail license shall be issued—

1. On condition that the applicant deliver to the clerk a sworn statement of the goods about to be offered for sale at the establishment for which he demands a license.

2. On condition that he pay to the clerk the tax thereon, and his fee of one dollar for issuing the same.

3. On condition that he make and deliver to the clerk a joint and several bond of himself and at least one good surety, in the penalty of at least one thousand dollars, payable to the state of Tennessee, conditioned that he will render to the clerk, at the end of twelve months from the date of his bond, a sworn statement of the invoice cost of all the goods which he or his assignee shall bring to said establishment for sale, within the said twelve months, and that he will pay the clerk the tax upon said goods.

680. At the end of the first twelve months, and of every twelve months thereafter, said license may be renewed—

1. On condition that the applicant has complied with the terms of the aforesaid bond.

2. On condition that he give a new bond, of the like tenor, for the ensuing twelve months, and pays the clerk's fees. But any goods remaining on hand and unsold, shall be exempt from further duty."

The petition for mandamus was filed in the circuit court, to

which, by sections 3567, *et seq.*, of the code, jurisdiction is given in such cases.

The defendants, represented by the same able counsel to whom I am replying, demurred to the petition. As required by the 2934th section of the Tennessee code, he specified the objections relied on. That section is in these words: "Demurrers for formal defects are abolished, and those only for substantial defects are allowed. *All demurrers shall state the objection relied on.*"

These objections were two in number, and in the light of the section just quoted, it is apparent that no grounds or reasons can be alleged to explain the judgment of the Supreme Court of Tennessee, other than such as they suggest. Hence we may dismiss, as irrelevant, the argument of Mr. Harrison upon pages 8 and 9 of his printed argument, as to the right of Furman, Green & Co. to a license, or their compliance with the laws of Tennessee. Had he desired, he could have alleged objections of this kind in his demurrer. As he did not, he waived them, and is now too late, unless after this Court shall have reversed, and remanded, he shall obtain leave to amend his demurrer, or by plea, set them up.

The objections he did state in his demurrer were: *First*, that the petition did not show a contract between the state of Tennessee and petitioners, or either of them, that the notes in question should be received in payment of state taxes; and *secondly*, that the petition failed to show ownership of the notes before the passage of the act of the general assembly of the state, passed in 1858, entitled, "an act to revise the statutes of the State of Tennessee" (Tennessee Code, title 4, ch. 5, art. 2), or before the repeal of the charter of the bank in 1866.

I am proceeding upon the hypothesis, that this Court can not know for which of these reasons, the Supreme Court of Tennessee sustained the demurrer, and dismissed the petition for mandamus. What I claim is, that the statements of the petition for mandamus, admitted by the demurrer, together with the public laws of the State, of which that Court and this Court alike have judicial knowledge, show, *first*, that there was such a contract, binding on the state, as by the first objection of the demurrer is denied, and, *secondly*, that section 603 of the Tennessee code (the same section referred to in the demurrer), which defines the kind of currency receivable for taxes, is unconstitutional and void, to the extent that it has the effect to impair the obligation of this contract; *thirdly*, that the authority exercised by the defendant, under the state of Tennessee, in the premises, as tax collector of Davidson county, was repugnant to the Constitution of the United States Article 1, section 10, and, *fourthly*, that by no possible process of reasoning, could the Supreme Court of Tennessee have rendered the judgment in question except upon one of two theories, viz: either that there was no such contract as alleged, or that the contract should not have effect because of the 603d section of the code, or of the authority of the defendant, exercised under the state.

After the elaborate recent examination of the question in 1 Wallace, 116, *The Bridge Proprietors* v. *The Hoboken Company*, in which Mr. Justice Catron, although dissenting, concurred as to the question now under consideration, I need not multiply authorities to the proposition, that jurisdiction is conferred upon this Court under the 25th section of the Judiciary act of 1789, where it appears that the constitutional question was presented to and passed upon by the Court below, "either by express averment, or by necessary intendment in the

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pleadings in the case," or where it appears "from the record that the question was *necessarily* involved in the decision, and that the State Court could not have given the judgment or decree which they passed, without deciding it." These are the first and sixth of the classes of cases, in which jurisdiction is said by Mr. Justice Catron, in pronouncing the opinion of the Court in 16 Peters, 281, *Armstrong* v. *The Treasurer of Athens County*, to have been conferred on this Court, by writ of error under the 25th section of the act of 1789. As Mr. Justice Miller well says, on page 143 of 1 Wallace, after citing the case last referred to, "Now, although there are other decisions, in which it is said that the point raised must appear on the record, and that the particular act of congress or part of the constitution supposed to be infringed by the state law ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the Court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on, by the party who brings the writ of error, and that the right thus claimed by him was denied."

See also *Crowell* v. *Randell*, 10 Peters, 368.
Ocean Ins. Co. v. *Polleys*, 13 Peters, 157.
Lessee of Coons v. *Gallaher*, 15 Peters, 18.
Neilson v. *Lagow's heirs and devisees*, 12 Howard, 98.
Medberry, et al. v. *Ohio*, 24 Howard, 413.
Railroad Co. v. *Rock*, 4 Wallace, 177.

I have purposely italicised the word "*necessarily*" in the quotation from Judge Catron. In the case at bar, I do not believe that the counsel for the defendant in error, great as is his ability, can point out any process of reasoning by which the Supreme Court of Tennessee could upon these

pleadings have reached this judgment, without either deciding that there was in law no such contract as the petition for mandamus alleged, and that therefore the statute or authority exercised was valid, or that, notwithstanding the contract, the 603d section, or at least the tax collector exercising authority under the state, imperatively and lawfully required state taxes to be paid in par funds.

It may be said, as has been said in like cases, that the question, contract or no contract, was one of the construction of state statutes, committed exclusively to the custody of state tribunals, whose rulings this Court is bound to follow. So argued my learned friends, Judge Spalding and Mr. Pugh, as they are reported on page 375 of 16 Howard, *Piqua Branch* v. *Knoop*, and Attorney General Murray in *Jefferson Branch* v. *Skelly*, 1 Black, 440, and Messrs. Bradley and Gilchrist for the Hoboken Company, as reported on page 129 of 1 Wallace, but they met with no response from the majority of the Court. The truth is, that when this Court admits this as a sound principle of judgment, it surrenders the defense of the inviolability of contracts to the keeping of the state courts. No court, state or federal, is ever likely to sustain a direct proposition to impair the obligation of a contract. It is attempted, as I said in my former argument, by evasions. These evasions are of two kinds, denials that the laws in question are contracts and within the protection of the constitution, and denials that as contracts, their construction is as claimed. But as against all such evasions, this Court has always maintained its jurisdiction, and never allowed that which was *here* considered a contract, upon the construction *here* approved, to be overthrown by state legislation. In *New Jersey* v. *Wilson*, 7 Cranch, 164, this Court decided that the transactions between the colony and the Delaware Indians amounted to a contract, and restrain-

ing the state from taxing the lands of Wilson, and other purchasers of the Indian titles. In *Dartmouth College* v. *Woodward*, laws incorporating an eleemosynary corporation were held to create a contract between the corporate body and the state. In *Piqua Branch* v. *Knoop*, already cited, and in *Jefferson Branch* v. *Skelly*, 1 Black, 436, the 60th section of the charter of the State Bank of Ohio was upheld as a contract, although the Supreme Court of Ohio had repeatedly put a different construction upon it. And the case of *The Bridge Proprietors* v. *The Hoboken Company*, 1 Wallace, 116, reserves to this Court the right finally to determine the true *construction* of state statutes, and to reverse, upon a writ of error under section 25 of the act of 1789, if the state court under an error of *construction*, has adjudged that no contract has been impaired.

So sacred is the trust thus committed to this Court, that no such devices and evasions can ever be allowed to prevail. To permit them, is to give up the trust.

The lamented Justice Wayne has placed the position of this Court in a clear light in the case of the *Jefferson Branch Bank* v. *Skelly*, 1 Black. I quote from page 443. "We answer to this" (viz, the argument that this Court should adopt the construction of the Supreme Court of Ohio,) "as this Court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the states, to state legislation and to state constitutions have been conclusive upon this Court, *with a single exception*, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has

an appellate power to revise the judgment of the supreme court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this Court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and can not be sustained by any course of reasoning that this Court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a state in such a matter when it entertained a different opinion: and in forming its judgment in such a case, it makes no difference in the obligation of this Court in reversing the judgment of the supreme court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority."

The petition for mandamus, after setting forth the charter of the bank, and particularly the provisions of the twelfth section, the ownership of the notes, and their description as within that section, the tender to the defendant, his official character, and his refusal to receive them, and issue the license, continues, "that said charter was a contract made with the people of the state, and every person into whose possession

the said notes, and issues of the said bank might come, that the same should be received by all collectors of taxes, and in payment of all dues to the State of Tennessee, and it is not in the power of the Legislature of the said State of Tennessee, to impair or annul the validity and binding force of said contract."

Mr. Harrison says, page 3, that this language does not allege "a contract between the state and the plaintiffs in error, or *that the state or its legislature had impaired or by any act attempted to impair the obligation of such contract.*"

But it is alleged that Furman was the owner of the notes, and certainly as such it is stated that there was a contract between him and the state, which entitled him to insist on the receipts of the notes for taxes. It was unnecessary to allege that the state sought to impair the obligation of the contract. This is no bill to injoin such impairing, but mandamus to enforce the contract. It did allege that the tax collector, the defendant, exercising an authority under the State, refused to receive the bills because they were not at par, and to issue the license to Furman, Green & Co., because, as he claimed, Furman had not paid his taxes.

The demurrer alleges three grounds of objection, stated as two, and Mr. Harrison truly says that the Supreme Court of Tennessee may have decided upon either one of them. I admit it, but what are they? *First*, that the 12th section does not constitute a contract. This objection depends entirely upon the construction of the act of incorporation of the bank, and is one of the very questions of which this Court will not allow itself to be deprived of the power of final decision. *Secondly*, that the plaintiffs failed to show by their petition that they became the holders of said notes, the issues of the Bank of Tennessee, before the passage of the act of 1858, to revise the Statutes of

Tennessee, Title 5, chapter 5, article 2, (incorrectly printed in both the record and Mr. Harrison's brief as Title 4. It is section 603 of the Tennessee code.) This section is in these words: "The collector shall receive in discharge of public taxes and other dues to the state, besides the constitutional and lawful currency of the United States: 1. Such bank notes as are current and passing at par in the state. 2. Warrants issued by the comptroller. 3. Certificates from the county court for killing a wild-cat, when offered in payment of the poll-tax of the person to whom such certificate is given." I admit that the petition does not show, but that the plaintiffs became holders after this section was adopted. What difference does it make? How does this suggestion impair the jurisdiction of this Court? Upon the question, contract or no contract, this Court judges for itself, is bound by no state decision as already shown, and will not permit its control of the power of judgment and construction to be avoided. By a decision of the Supreme Court of Tennessee, construing these laws so as to avoid the overthrow of either, such a decision as we know was in fact made in this case, I admit that this Court is bound, because it is a mere construction of a state statute. But a decision the other way is something more. It is a denial of the existence of an alleged contract, and that question this Court has the right to examine for itself. When a contract is *impaired* the jurisdiction of this Court attaches. And this suggestion is merely to the effect that there was no contract, because the 12th section of the charter was by this section by implication repealed. *Thirdly*, that the petition does not show that the plaintiffs became owners of the notes before the repeal of the 12th section of the charter in 1865. True; but again I ask, what of it? This is a question of construction, the defendant in error seeking to get rid of the 12th section, by

suggesting that it operated as a contract only in favor of those who held the notes when the 12th section was repealed.

The objections then were, each and all, within the description given by Judge Wayne, of cases in which the Court will assert its jurisdiction. And the case was this, that the plaintiffs sought to enforce a contract, made as they said with the State of Tennessee, against a public officer exercising authority under the state. The defendant was by law required to receive certain kinds of money for taxes. This law he must apply, unless the state has obliged itself, and him as its representative, by contract, to receive the bank bills of the Bank of Tennessee also for taxes. He demurs, and by his demurrer says, there is no such contract, or if there ever were, it can not be construed as the plaintiffs construed it, as still existing, and operative in favor of those who became beneficially interested after the repeal of section 12. This is just what Ohio said in the Jefferson and Piqua Bank cases.

The Supreme Court of Tennessee decides upon any of the grounds objected in the demurrer, I care not which, or upon all of them, that there is no such contract. So did the Supreme Court of Ohio, repeatedly, upon the 60th section of the State Bank charter. Attorney General Murray came here with this very argument in 1 Black.

Mechanics & Traders Bank v. *Debolt*, 1 Ohio State, 563.
Knoop v. *Piqua Bank*, 1 Ohio State, 690.
Toledo Bank v. *Bond*, 1 Ohio State, 622.
Exchange Bank of Columbus v. *Hines*, 3 Ohio State, 1.
Sandusky City Bank v. *Wilbor*, 7 Ohio State, 481.
Jefferson Branch Bank v. *Skelly*, 9 Ohio State, 606.

Now, if this Court should be of opinion that there is such contract, notwithstanding the judgment of the Supreme Court

of Tennessee, what shall restrain the expression of it? Is it because the question was raised below by demurrer? That would be to require a petition for *mandamus* to anticipate the defense, and became a sort of application at law for an injunction against a misconstruction of a statute. But the Court have the statutes of Tennessee before them, preserved to the last syllable in the judicial remembrance. The demurrer appeals to, and presents those statutes, and among them specifies section 603, and the defendant in effect says to us: "I shall obey section 603, because there is no contract which takes your case out of it." What is this but an affirmance that section 603 is valid, despite the alleged contract, because it is no contract? The validity of section 603 is thus drawn in question, just as in the Ohio cases, the validity of the state constitution and tax laws under it were drawn in question, by a judgment below that there was no such contract as was there claimed.

Does it make any difference that section 603 was passed before these bills were issued? I can not see that it does. A legislature passes a general tax law. A subsequent legislature exempts, by special provision, a bank or other corporation. Litigation ensues, the state insisting on the unconstitutionality of the second, the exempting law; the corporation insisting that it does, in fact and law, withdraw its property from the scope of the prior general tax law. Can any body doubt that, in such a conflict, the validity of the earlier law would be drawn in question? Suppose the state court held that the earlier law controled—the later law being unconstitutional, that is, forbidden by the state constitution—could not the case be brought here under the 25th section of the act of 1789? The question of the constitutionality of an act is a question of its *effect.* (See opinion of Mr. Justice Trimble, in *Ogden* v. *Saunders,* 12 Wheaton, 316; arguments of Messrs. Stanberry and Gilpin,

suggesting that it operated as a contract only in favor of those who held the notes when the 12th section was repealed.

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5 Howard, 319, 333). The constitution and tax laws of Ohio were valid enough, as to all other property, but they could not, consistently with the constitution of the United States, have the effect attributed to them of dispensing with the obligations of the 60th section of the charter of the State Bank. What difference could it have made, had the general tax law, which was attempted to be enforced against the State Bank of Ohio' been passed before that charter? In the case of *New Jersey* v. *Wilson*, the claim which the state made was, that the sale by the Indians brought the lands within the scope of the State's power to tax. What difference would it have made had the tax law of New Jersey, attempted to be applied, been passed before the contract between the colony and the Delaware tribe?

In all these cases the party, insisting on the protection of the constitution, impeached either the validity of the state statute, or of the authority of the state officer. In this case, we do both.

The language of the 25th section gives this court jurisdiction, "where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity.' 1 Stat. at Large, 85.

"Under this clause of the act of Congress," say the court, in *Commonwealth Bank of Kentucky* v. *Griffith, et al.*, 14 Peters, 56, "three things must concur to give this court jurisdiction:

"1. The validity of a statute of a state, or of an authority exercised under a state, must be drawn in question.

"2. It must be drawn in question upon the ground that it is repugnant to the constitution, treaties, or laws of the United States.

"3. The decision of the State court must be in favor of their validity."

In the case at bar, I submit that there is no escape from these conclusions:

1. That the validity of the Tennessee tax law of 1858, section 603 of the code, was drawn in question. I mean its validity, not in other cases, but in its application to the taxes of Francis Furman.

2. That the validity of the authority of Philip L. Nichol, clerk of the county court of Davidson county, as tax collector, exercised under the state of Tennessee, was also drawn in question. I mean, the validity of his authority in the collection of the taxes of Francis Furman, and the issuing of a mercantile license to Furman, Green & Co.

3. That this statute, and this authority were drawn in question upon the ground that they were each repugnant to article 1, section 10 of the constitution of the United States, which secures the inviolability of contracts.

4. That the decision of the Supreme Court of Tennessee was in favor of their validity.

But it must not be forgotten that the *jurisdiction* of this Court does not depend upon the correctness or incorrectness of the judgment of the state court. It is not necessary, for the purpose of giving this Court *jurisdiction* that we should first prove that the judgment below ought to be reversed. The *jurisdiction* of this Court is just as complete where the decision of the state court was right as where it was wrong.

And therefore to establish this *jurisdiction*, which is the power to hear and determine, all that is necessary is to show that the validity of a state statute, or of an authority exercised under a state, was "*drawn in question*," in the state court. Whether rightly or wrongly drawn in question is not now to

be considered. That will appear when the merits of the case are brought into judgment.

Upon any and every view of the judgment below it is true that the authority of Nichol, exercised under the state of Tennessee, was drawn in question. It was directly impeached by the petition for mandamus.

Was it drawn in question upon the ground that it was repugnant to the Constitution of the United States? It certainly was. The demurrer admitted the truth of the petition, which directly alleged that such was the case. The plaintiffs then drew in question his authority on this precise ground. And the Supreme Court of Tennessee sustained the validity of his authority.

GEO. HOADLY.

Cincinnati, Ohio, March 2, 1869.

Supreme Court of the United States.

DECEMBER TERM, 1868.

FURMAN, GREEN & CO.,

Plaintiffs in Error,

vs.

PHILIP L NICHOL,

(*Clerk of Davidson County Court,*)

Defendant in Error.

ERROR TO SUPREME COURT OF TENNESSEE.

ARGUMENT OF GEORGE HOADLY,

FOR THE PLAINTIFFS IN ERROR.

POINTS:

In 1838, the Legislature of Tennessee established, with the funds of the State and for its sole benefit, the Bank of Tennessee. The twelfth Section of the Act of Incorporation was in these words: "That the bills or notes of the said corporation, originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes, or other moneys due to the State." In 1865 this section was repealed.

1. This section was not repealed, by implication, by section 603 of the Code of Tennessee, passed in 1858.
2. This section was, until repealed, a contract between the State and every bill-holder of the bank, obliging her to receive the bills for taxes.
3. This contract is wholly unaffected by the repeal, as far as bills issued before that date are concerned:—the duty to receive the circulation, when offered for taxes, is not discharged by the circumstance that the holder acquired title after repeal.

A. Abraham, Pr., 118 West Third Street, Cin.

Supreme Court of the United States.

DECEMBER TERM, 1868.

FRANCIS FURMAN & FRANCIS W. GREEN, Plaintiffs in Error,
vs.
PHILIP L. NICHOL, Clerk of the County Court of Davidson County, Tennessee, Defendant in Error.

MANDAMUS.

ERROR TO SUPREME COURT OF TENNESSEE.

Argument of George Hoadly, of Counsel for Plaintiffs in Error.

STATEMENT OF THE CASE.

This cause comes into this Court by writ of error to the Supreme Court of Tennessee, under Section 25 of the Judiciary Act of 1789.

Francis Furman and Francis W. Green filed, on the 14th day of August, 1866, in the Circuit Court of Davidson County, Tennessee, their petition, (*Record, page* 1), praying for an alternative mandamus, or rule *nisi*, and on final hearing for a peremptory mandamus, directed to Philip L. Nichol, Clerk of the County Court of the same county, com-

manding him to receive from the petitioner, Furman, the sum of $3,535.00, in notes of the Bank of Tennessee, issued prior to May 6th, 1861, and issue to them a license to sell goods, wares and merchandise, as wholesale merchants in the city of Nashville, for one year from August 1, 1866.

They state, in the petition, that before the 1st day of August, 1866, the petitioner, Furman, had been a licensed wholesale merchant in Nashville; that, on that day, he entered into co-partnership with the petitioner, Green, under the firm name of Furman, Green & Co.; that on the 3d day of August, 1866, the petitioner, Furman, made to the defendant a sworn return of the invoice price of all the goods which had been brought into his mercan ile establishment since the date of his license, August 28, 1865, upon which there appeared to be due to the County of Davidson, the sum of $883.65, which he tendered to the defendant in lawful currency of the United States; but the defendant refused to receive the same unless said Furman would also pay his State taxes in the same currency; that upon said statement, there also appeared to be due to the State of Tennessee, as State taxes of said Furman, the sum of $3,534.58, which he tendered to the defendant in notes and issues of the Bank of Tennessee, issued prior to the 6th day of May, 1861, which the defendant refused to receive, because they were not at par; that the petitioners also tendered to the defendant a bond, as required by law, with R. T. Kirkpatrick as surety, in the penal sum of one thousand dollars, conditioned that, within twelve months from date, they would render to the Clerk of the County Court of said Davidson County, a sworn statement of the invoice cost of all the goods, which they or their assignee should have brought to their establishment, for sale, within

said period, and pay the tax thereon, and otherwise comply with the revenue laws of said State; that they also tendered to the defendant his fee, and demanded from him a license to sell goods, wares and merchandise, as wholesale merchants, in said Nashville, for the next ensuing year; that the defendant refused to receive said bond and issue said license, "because petitioner, Furman, had not paid said State tax, due from him as aforesaid, in par funds, and had only tendered and offered to pay the same in said notes and issues of the Bank of Tennessee." (*Record, page* 2).

The petition also averred, in connection with various matters of law, to which I shall refer elsewhere, that the 12th section of the act of incorporation of the Bank of Tennessee provides that the bills or notes of said corporation, originally made payable, or which should have become payable in gold or silver coin, should be receivable at the Treasury of the State, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State; that the bills tendered as aforesaid were issued by said Bank as provided for in said 12th section, and payable to bearer, and the laws of the State make the defendant the collector of taxes, and that it was his duty as such to receive the said bills from the petitioner, Furman, and to issue the license aforesaid.

To this petition, the defendant filed a demurrer, (*Record, page* 7), alleging as causes thereof: *First;* that the petition did not show a contract between the State of Tennessee and the petitioners, or either of them, that the notes in question should be received in payment of State taxes; and *Secondly;* that the petition failed to show ownership of the notes before the passage of the Act of the General Assembly of

the State, passed in 1858, entitled "An Act to revise the Statutes of the State of Tennessee," (*Tennessee Code, Title 4. Ch. 5, Art. 2*), or before the repeal of the charter of the Bank in 1866.

At the September Term, 1866, the Circuit Court, (*Record, page 8*), overruled the demurrer, and gave judgment, ordering a peremptory mandamus.

The defendant appealed to the Supreme Court of the State, and at the December Term, 1866, the judgment was reversed, and the petition dismissed at the petitioners' costs, for which execution was awarded. (*Record, page 36*). The opinion of the Supreme Court is filed, and made part of the record, from pages 25 to 36 inclusive, and fully shows that the Court held the obligation of the contract contained in the 12th section of the Charter of the Bank to have been, in fact, successfully impaired by the repeal of that section in 1865. It is also reported in 3 *Coldwell*, 432.

ARGUMENT.

As under Section 10, of Article 1, of the Constitution of the United States, no contract can, in law, be successfully impaired, the Supreme Court of Tennessee resort, as is usual in such cases, to an evasion. I do not mean an unworthy or conscious evasion, for I doubt not that learned Court were fully persuaded of the result they reached. The Supreme Court of Ohio were so fully convinced they were right, that repeatedly, and irrespective of political changes in their body, they held the 60th section of the charter of the State Bank of Ohio, not to constitute a contract exempting the branches of that Bank from other than a specific rate of taxation, but were as often overruled by this Court, and their judgments reversed, for the reason, that here, the section in question clearly appeared to be a contract, and, as such, within the protection of the Constitution. In the case at bar, it was denied in argument, but admitted by the Court, that the 12th section of the act incorporating the Bank of Tennessee was in force when the bills held by the plaintiffs were issued, and the Court did not deny that it constituted a contract, with those who held the bills at the time of the repeal of that section in 1865, from the obligation of which the State could not escape. But the petition failed to show that the plaintiffs held the bills at that time, and therefore, *non constat* but they might have received them afterwards. The evasion, of which I complain, consists in attaching to the transfer of these bills, after the repeal of this section, the effect of depriving the transferee,

or new holder, of the right to claim any benefit under the guaranty or promise contained in the section. It is not denied that the contract, expressed in the section, attached to the bills, in the hands of the then holder, or to him in consequence of his ownership of the bills, giving value to them in his hands, but in the act of parting with them, after that date, it is claimed that the right to insist upon the contract expired; not like a term of years, by lapse of time, or a qualified fee, by the happening of a contingency, in accordance with an original intention, expressed when the term or the fee was created; not like a tenancy for life, because of the act of God, but rather like a policy of insurance assigned without the underwriter's consent. There is this difference, however, that the reason for the rule, the personal trust and confidence in consequence of which, in the case of such insurance, the underwriter assumes a great hazard for a small premium, fails to apply to this case, where the bills are transferable by delivery, the holders are many in number, cannot be personally known to the State or its representatives, may be resident within or without its borders, and within the State are, perhaps, enrolled in the great number of those who have been disfranchised as unworthy of such trust, or of those who for years after the bills were issued, perhaps at the very time they in fact came into the possession of such holders, were slaves, incapable of legal property, or the confidence of the State.

In discussing this question, I urge the following propositions: The *first*, however, I do not understand to be properly before the Court. A writ of error in such a case can be sued out by us only on the ground that a State statute has been held not to impair the obligation of a

contract, which in truth it impairs. We suppose that the Court will confine its attention, therefore, to the constitutional question. But should it be said that there is no such question, because there is no such contract, or that the law supposed to contain it had been before repealed, we answer:

I.

The 12th section of the act of incorporation of the Bank of Tennessee was not repealed by section 603 of the Tennessee Code, which went into effect in May, 1858.

It is claimed that section 603 repealed the 12th section of the act of incorporation by implication. But it must be a *necessary* implication. Mr. Dwarris in his work on Statutes, page 533, says there is no repeal by implication unless made quite plain. Lord Coke, in *Dr. Foster's case*, 11 *Rep.* 63, says, "it must be known that forasmuch as acts of Parliament are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act to be abrogated, *sed hujusmodi statuta tanta solemnitate et prudentia edita*, (as Fortescue speaks, cap. 18, fol. 21,) ought to be maintained and supported with a benign and favorable construction." See, also, *Bowen* vs. *Lease*, 5 *Hill*, 221. *Canal Co.* vs. *Railroad Co.*, 4 *Gill & Johns.* 1. *Street* vs. *Commonwealth*, 6 *W. & S.* 209. *Commonwealth* vs. *Herrick*, 6 *Cushing*, 465. In *State* vs. *Minton*, 3

Zabriskie, 529, this rule was, by the Supreme Court of New Jersey, applied to a case where a rate of taxation, fixed in a special charter of incorporation, was insisted on and sustained, as a protection against a subsequent general tax law, although the charter had reserved, to the Legislature, the right to alter, amend or repeal it.

The 603d section of the Tennessee Code provides that "the Collector shall receive, in discharge of public taxes and other dues to the State, besides the constitutional and lawful currency of the United States; 1st. Such bank notes as are current and passing at par in this State. 2d. Warrants issued by the comptroller. 3d. Certificates from the County Court for killing a wild cat, when offered in payment of the poll tax of the person to whom such certificate is given."

In the case at bar, the Supreme Court of Tennessee have held that this section did not repeal the 12th section of the act incorporating the Bank of Tennessee. This decision being a construction of the effect of the statute, will be adopted by this Court. The question presented was, had the 12th section been repealed? The highest Court of the State which made the laws, denies it. This Court, even if convinced that as an original proposition, it should have been decided otherwise, will, nevertheless, follow the ruling. It was like their taking jurisdiction of this case, not re-examinable here. *Woodruff* vs. *Trapnall*, 10 *Howard*, 209. For the decision involved no question upon which the correcting and reversing power of this Court could be invoked. Even if, for the sake of the argument, we suppose it did, it was, nevertheless, a decision in favor of, not

against the contract. Had the Court below given the construction to the contract, which my learned associate Judge Caruthers claimed for it, the case could never have come here. And this is true, even if the better reason were that the 12th section was repealed in 1858.

But such is not the better reason in the matter. For *first*, the section 603 contains no negative words. It provides what the collector "*shall* receive," not what he *shall not* receive. It enables, not disqualifies. It is therefore consistent with, and does not repeal another previous act, also stating what the collector shall receive.

And *secondly*, by its own terms, as expressed in sections 41 and 42, it saves, from any such implication, all the sections of the act of incorporation.

Section 41 declares that, "all public and general acts passed prior to the present session of the General Assembly, and all public and special acts, the subjects whereof are revised in this Code, except acts establishing or regulating Special Courts, subject to the limitations, and with the exceptions hereinafter expressed, are hereby repealed."

Section 42 provides that "Local, special and private acts, and acts of incorporation heretofore passed, are not repealed, unless it be herein so expressed."

Now the Code does not revise the subject of the act of incorporation of the Bank of Tennessee, and the 41st section would, therefore, alone suffice to show the absence

of legislative purpose to repeal the 12th section. All doubt is however removed by section 42, which saves the act in question from repeal, unless "*expressed.*" Implied repeals do not seem to have been favored by the Legislature of 1858. Nor are they by the Courts of Tennessee. *Cate* vs. *The State*, 3 *Sneed*, 120.

This Court, any Court, indeed, would hesitate, and the higher the rank, and greater the wisdom of the tribunal, the greater the hesitation, to pronounce in favor of an implied repeal of a section, which gave value and credit to the issues of a bank, that was, perhaps, daily increasing its circulation, and that had been established with the funds, and for the benefit of the State itself, to supply a circulating medium to pass from hand to hand of the people as money. Before withdrawing such a guaranty, an explicit avowal of purpose might well be expected. Otherwise the State would withdraw her assurance, which is valuable to her as the means of extending the credit of her institution, without the knowledge of many of those most interested. For repeals by implication are not discovered instantly, and are apt, when discovered, to create question and doubt. He, who holds one of these bills, has lent the State of Tennessee, the sum called for by the bill, without interest. Can we suppose that the State would withdraw its guaranty, which gave him the confidence to make the loan, without explicit notice? That the State would seek to secure the confidence and evade the obligation?

And it appears that the section was repealed, in terms, in 1865; a nugatory act, if it had already passed from legal life in

1858, and one very unlikely to have been enacted, had not the credit of the State's guaranty attached to the bills meanwhile in law, as well as in fact.

II.

The 12th section of the act of incorporation of the Bank of Tennessee was, until repealed, a contract between the State and every bill-holder of the bank, obliging the former to receive the bills for taxes.

This proposition will hardly be denied; and yet, it may aid us in the discussion of the further question, as to the effect of the repeal, to consider it with some care.

The act in question was adopted by the Legislature of Tennessee, January 19, 1838, and with its amendments, is printed on pages 10 to 25, inclusive, of the record.

The first section, in establishing the bank, "in the name and for the benefit of the State," pledges "the faith and credit of the State for the support of the said Bank, and to supply any deficiency in the funds hereinafter pledged, and to give indemnity for all losses arising from such deficiency."

Subsequent sections provide for the raising of the capital, five millions of dollars, the appointment of the directors by the Governor, subject to confirmation or rejection by the

General Assembly, and for the management of the Bank. The 8th section distributes the dividends as follows: $100,000, annually, to common schools; $18,000, annually, for thirty years, to county academies; the residue of the dividends to be "set apart as a sinking fund to be applied to the extinguishment of the accruing interest on the bonds of the State." The ninth section enacts, in its sixth article, the following, as one of "the fundamental laws of said bank," viz., that in case the debts owing by the corporation should exceed twice the amount of capital stock paid in, and in case the "entire amount of the risk on investment of securities, in what form soever, (save and except actual current coin,) at any time exceed twice the amount of the capital stock paid in," the directors, under whose administration it should happen, should be liable for the same in their private capacities. "But this shall not be so construed as to exempt said bank, or the lands, tenements, goods or chattels of the same, *and on their insufficiency, the State of Tennessee, being also liable for, and being chargeable with the said excess.*"

The tenth section provides that the bills or notes of said bank, which shall be made payable to bearer, shall be "negotiable and assignable by delivery only."

Section 12 is in these words: "That the bills or notes of the said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes and other moneys due to the State."

As the entire capital and profits of the bank belonged to the State, and the directors were appointed by the Governor, as the faith and credit of the State were pledged to its support, it is obvious that the leading purpose of this section was to increase and magnify the credit of its circulation with the people. It was their bank, established for their use; its notes were their notes, intended as their ordinary currency, and it was in every way important that these notes should perform as many of the functions of money as possible. The State of Tennessee could not make them legal tender for private debts, but it thus did all that it could to ensure to them the confidence of the community, and that when issued, they might not go back after the fashion in which a former Mayor of Cincinnati once welcomed the Legislature of Ohio to this city, by wishing them "a safe and speedy return." This is the very device, long afterwards adopted by the United States, which now gives to the National Bank notes, so much of the power they have, in these days of protracted suspension of specie payments. It is engraved on the reverse of each of the National Bank notes in these words: "This note is receivable at par in all parts of the United States in payment of all taxes and excises, except duties on imports, and also for all salaries and other debts and demands owing by the United States to individuals, corporations and associations, within the United States, except interest on public debts.

This action, as the Supreme Court of Tennessee rightly decide, is, until repealed, a continuing proposal by the State. Upon the receipt, from the bank, of any of the bank bills described in the 12th section, that is to say, bills originally

made payable on demand, in coin, *i. e.* the ordinary bank bills, or of those which might become payable on demand in coin, *i. e.* post notes, the offer was accepted, and the contract complete. As the bills tendered by Furman, were, as the petition alleges, and the demurrer admits, "issued by the Bank of Tennessee as provided for in said 12th section of said charter, and payable to bearer," it follows that there was at the time of the repeal of the charter, between the State and the then holder or holders of these bills, an existing contract, by which the State had promised and was bound to receive them at the State treasury, and elsewhere, whenever presented to "tax collectors or other public officers, in all payments for taxes or other moneys due to the State."

And it is obvious that the contract has the same force and effect as if the 12th section were printed or engraved on every bill, and formed a part of it. Being a public law of the State of Tennessee, it was known, or supposed to be, to every citizen; every dealer with the Bank and receiver of bills from it, is also presumed to have a knowledge of it, and, therefore, such pains were perhaps unnecessary, actually to acquaint the public with the provident provision made by the State for its protection. But in law, it entered into and became a part of the contract of the bill. The Bank promised to pay the amount in coin on demand. The State assured the holder, that if he preferred to withhold it from presentation for payment in coin, and to use it in payment of taxes to her, she would always so receive it. As the State alone owned the bank, both these promises are in effect those of the State, but the one was to be discharged in the first place by the artificial person called the Bank of

Tennessee, out of the funds provided in the capital stock and other assets of the bank; the other had the security of the perpetual, and, in every American State, increasing sum annually required by the State to be contributed by the people in the form of taxes. Thus two purposes were accomplished:—that of the State, to borrow of the holder, without paying interest, his paper bearing interest, for the use of her Bank; for the transaction which consists of the issuing and redemption of a bank bill, is equivalent to a loan to the bank, without interest, of the amount of the bill, for the length of time intervening between issue and redemption; and that of the holder, to obtain a better security for the present value and immediate use of the bill. For in case of insolvency, and want of assets of the bank, however good might be the assurance of ultimate redemption contained in the high character for integrity, and disposition to keep faith, or the wealth of the people of the State, the holder would derive more present confidence and sense of security, from the fact, that he would not have long to wait until the annual day of tax gathering should enable him to use the bill at its par value.

An attempt is made by Judge Hawkins to distinguish this case from *Woodruff* vs. *Trapnall*, 10 *Howard*, 190, by the assertion that the common school fund of the State, as well as the surplus revenue of the United States, deposited with the State, were embarked in the enterprise as part of the capital of the bank, although trust funds, which the State held merely as trustee.

If this could now be fairly said, it is not easy to see that any consequence, of importance to the question in hand, follows. Even if the State were guilty of malversation, in

diverting these funds to this purpose, her pledge to make good the losses incurred in the operations of the bank, her agreement to receive the notes for taxes, is, if not actually made in honor more obligatory, unaffected. She is still left, as was the State of Arkansas, in *Woodruff* vs. *Trapnall*, the only stockholder of the bank. Withdrawing part of the capital does not make the promise to pay the debts, or to receive the notes for taxes, less sacred. It is a novel proposition that, because the State of Tennessee did herself a wrong in using these trust funds in banking, she is now justified in breaking her promise to Francis Furman. If two wrongs will not make a right, neither will one wrong make another wrong right. The effect of this argument, on the present question, if any, would be to show that, because these funds were thus misused, the State, instead of being to that extent a shareholder, is *pro tanto*, a creditor, perhaps a preferred creditor, *of herself*. But how the withdrawal of so much of the assets of the Bank, from the grasp of its other creditors, can release the State, which gets the benefit of this maneuvre, from its duty to receive the bills for taxes, is not obvious. There is a *non sequitur*. Diminishing or exhausting the assets is not payment of the debts. They do not diminish in proportion. Only one side of the balance sheet is affected.

But it is respectfully submitted that the State was guilty of no malversation. The common school fund was not like statuary or paintings, to be kept intact, looked at, but not used; nor like wine to be ripened and then consumed; but rather like a vine to bear fruit, which fruit, or annual profit, was to be applied in furtherance of the objects of the trust. The manner of investment was discretionary with the State. And Article 11, Section 10, of the State Constitution contemplates the investment and getting of interest on the

school fund; and the pledge that the fund shall not be diverted from the support and encouragement of public schools means only, that the principal shall remain undiminished by losses, and the interest be perpetually applied, in furtherance of this beneficial end. The pledge is no more sacred than that made to the bill holders and creditors of the bank. It is not as sacred, for one is a pledge of the State to its people, depending on good faith and high sense of honor for its fulfillment; the other is a contract, enforceable by the Courts. As to the surplus revenue, it was a debt to the United States. The Court term it a deposit with the State, and such it was, but of the species of deposit, called in the civil law *mutuum*, which is another name for debt. The State did as she pleased with the money deposited, being required by law to return, not the identical funds, but an equivalent sum, when demanded, but not supposing that the call would ever be made.

To return to the contract between the State and the bill-holder, Francis Furman, or another: The agreement was complete when the bill was first issued; on one side, the consideration was the receipt of the bill from the bank at the request, and on the faith of the promise of the State; on the other, the payment by promissory note, bill discounted, or otherwise, of an equivalent sum to the bank. The language of the contract is the 12th section, and as if engraved upon the bill. To each person who received such bill from the bank, the State said, if you will take it from the bank "I will receive it for taxes." Did it restrict the promise so as to mean "I will receive it from you only?" Or did its contract signify, "I will receive it for taxes by whomsoever presented, so that if you find it inconvenient to make such use of it yourself, you may transfer and

deliver it to another, and he may make such use of it, precisely as you would assign any other negotiable security, endorsed by another?"

III.

This contract, as to bank bills issued before the repeal of the 12th section, is wholly unaffected thereby; the obligation to receive the circulation when paid for taxes, is not discharged by the circumstance that the holder purchased it after repeal.

The question is one of interpretation;—what does the 12th section mean?—of legislative intent, what did the State of Tennessee intend should be understood by it?

The Supreme Court of Tennessee have been astute to devise a theory which would excuse the State. It would seem, at first view, that all escape is denied. Reflection will, I think, confirm this, and convince the disinterested student that the Court's argument may be ingenious, but but is certainly unsound.

They do not deny that any one who was a bill-holder, at the time of repeal, might, after repeal, insist upon the receipt from him, in payment of *his* taxes, of the identical bills then so held.

Justice will be better done to the argument by a quotation of its very language. On page 32 of the record, we find it put by Judge Hawkins in this form: "So long as the 12th

section remained upon the statute book unrepealed, there was a continuing proposition upon the part of the State to its citizens; if you will receive the notes of the bank as money, the State will receive them from you in payment of your dues to the State; and if a second party is thereby induced to receive them from the party who received them from the bank, the proposition of the State is thereby accepted by the second holder, and upon its acceptance another contract becomes complete, as between the second holder and the State, by which the second holder of the notes is entitled to discharge his indebtedness to the State in the notes of the bank, not because of any imaginary guarantee upon the part of the State, running with the note as a covenant under seal running with the land, not because the second holder is substituted to the rights of the first holder, but because when the proposition of the State to him, that if he will receive the notes as money, it will receive them from him in payment of taxes and other dues, is accepted by the receipt of the notes, a separate, distinc- and independent contract is made; and thus, as long as the proposition is continued, contract after contract springs up between the State and persons into whose hands the notes may successively pass."

Now, it is to be observed that the contracts spoken of are those, "bills or notes," to which the quality of negotiability at law as well as in equity, may be added by proper words to that effect.

With the first holder, it is admitted that a contract is complete on the part of the State, when he has received the note from the bank. This contract, it cannot be denied, imparts value to the note in his hands. The nature of the contract is an assurance, by the State, that the note may be

used in payment of taxes. Is this a personal contract with the holder? Surely not; for contracts are unassignable, because personal, only when the relations between the darties are such, as to show that the performance was intended to be undertaken to or by the particular person, and none other. Thus, in contracts of insurance, where the reward is small, the hazard great, the character of the insured material, because upon his integrity, or even his prudence and care, may depend the chances of fire or marine disaster, the agreement is personal, and the assured may not assign without consent of the underwriter. For like reasons, the powers granted to an executor are confided to him alone, and cannot be executed by an administrator *de bonis non*. So, too, a special letter of credit directed to a particular mercantile firm, can be accepted by no other. Nor can any one but the person named as the beneficiary of the letter of credit, avail himself of it. In this sense, it is true that guaranties are non-negotiable, both at law and in equity. But when the money has been advanced, or the goods sold, the letter of credit has ripened into a liability, or legal obligation, assignable in equity, but not generally at law, for want of words of negotiability.

Small vs. *Sloan*, 1 *Bosworth*, 352.
Reed vs. *Garvin*, 12 *Serg. & R.*, 100.
Bank of Ashland vs. *Jones, et al.* 16 *Ohio State*, 145, 162.

But if proper words of negotiability are used, then the guaranty will follow the principal debt, even at law.

Story on Promissory Notes, § 484.
Ketchell vs. *Burns*, 24 *Wend.*, 456.

The very point came under consideration in Tennessee, in *Smith, et al*, vs. *Dickinson*, 6 *Humphreys*, 261, where it was held that "a guaranty of a bond or note is not negotiable, *unless made so by express terms*, but is limited to the person to whom made or delivered."

Now, negotiability is a quality attached by the statute of Anne to promissory notes, and which the Legislature of Tennessee could at any time annex to any species of contract. And all that is necessary to that end, is words substantially expressing the Legislative purpose. It is difficult to conceive of terms more fitly chosen to that end, than those adopted in the 12th section. The word used is "receivable," a word best fitted to express the intention to impress the quality of receivability upon the bills, as an essential element or ingredient of their nature. Thenceforward, receivability is predicable of these bills, and they can no more be conceived of without it, than without payability, if I may coin a word. This is no mere direction to tax-gatherers, but a substantial addition to the character of the bills. They shall be "receivable." Of the bills or notes of the corporation, originally payable, or which shall have become payable, in coin, it enacted that they shall be receivable in *all* payments for taxes, or other moneys due the State. This is not, then, a personal guaranty to the first or any particular holder, It is a guaranty to such first holder, which passes to his assignee with the bill, and becomes his legal right, while he owns the bill, capable of enforcement by him, and of assignment by him. This is negotiability. And the guaranty, thus viewed, is seen to be a promise of the State to the first holder; by him, and each successive holder, transferable with the bills. No one

pays the *State* directly for the guaranty but the first holder he does it by agreeing to receive the bill at par from the State's bank, at the request of the State, in consideration of the guaranty. If the guaranty adds to its credit, it justifies him in taking it a- par and enables him to transfer it more readily, and when transferred, *he*, not the State, is paid for it. Thus, if by reason of the guaranty, he can get par for the bill, whereas, without it, he could get but seventy-five cents, the difference represents the value to *him* of the guaranty which he purchased from the State in consenting to receive the bill in the first instance. To deprive him of this twenty-five cents, without his consent, is to impair the obligation of his contract with the State. The State has received the same sum fron him. It is a fact of history, that the decision of the Supreme Court of Tennessee, in this case, caused a large reduction in the market value of these bank bills. It is safe prophecy, that a reversal by this Court would cause an equal appreciation. These fluctuations are true approximate measures of the value to the present holders, of this guaranty, a value they can at once realize by the sale of the bills, should this hearing result in such reversal.

Again, the purpose of the Statute is not merely to assure the first holder that *he* may use the bills in payment of taxes, but to create confidence on his part in their value, indeed to add a value to them in his hands, by assuring *him* that his transferee may also so use them. The assurance or guaranty that each holder may pay them out for taxes, is not a *new* agreement with such holder first made at the time he becomes holder. When the first holder took the bills from the Bank, the State promised *him*, that if he

should assign them, his assignee, and his assignee's assignee, might also use them for payment of taxes. To deprive his assignee of this right is, therefore, to violate a contract made originally with *him*. Such is the natural import of the language of the section, and is the just result of the fact that the paper has an increased value in the first holder's hands by reason of such right of the assignee. It makes it more current. And, so, being always able to pass the bills readily, he confides in them as he would in money, and does not hurry with them, for coin, to the counter of the State's Bank, or seek to get rid of them as of doubtful credit. For, if I am right in supposing that this quality of receivability for taxes has the effect to increase the credit of the bill and the confidence of the holder in it, this constitutes a value to it in *his* hands, purposely created by the Legislature to that end, and justifies the conclusion that in the 12th section, they have said to *him*, if you will take this note from the bank, we assure *you* that when you sell, he to whom you sell, may use it for payment of taxes. In other words, they say to the first holder of the bill, when he takes it from the bank, "we promise you and your assigns, that if you will take this bill, you and they, whoever may be its holder, may always use it in payment of taxes." Such promise is a continuing guaranty, necessarily negotiable. This right so to use is thus paid for by the first holder to the bank; in his hands, it is property, acquired for a consideration, which he, in turn sells and is paid for, when he sells the note. Otherwise, if the note has this increased value in his hands, because of its power in his assignee's hands, it is a value for which he has given no consideration whatever.

Whereas, on the theory of the Supreme Court of Tennessee, that the State makes this promise only to each new holder, as *he* takes the paper, the result is that the first holder loses the right to use the note in payment of taxes when he parts with the note, and the new holder acquires it:—but the first holder does not sell this right, and, of course, is not paid for it, although because of the value added by the State's promise, he may receive in coin, or its equivalent, the par of the note, and thus get more for the note than he otherwise could, and although he paid for it when he took the note from the bank, his consenting to take it at the State's request and on her promise, being such payment; and the State of Tennessee, which is not a party to the transaction, is paid for it each time of transfer! Is not the other the more reasonable theory, viz., that the State promised the first holder that he and every subsequent holder might use the paper in payment of taxes, if *he* would consent to take it from her bank, and that this guaranty, like an endorsement or negotiable words of guaranty, on the note itself, giving credit and thus adding to its value, passed with it into whosoever hands it might come?

And is not this conclusion strengthened by the fact that we find the Supreme Court of Tennessee compelled, at the end of the passage quoted, to resort to this extraordinary statement. "There is no guarantee, whatever, upon the face of the note, or in any other manner accompanying it. The obligation of the State springs alone out of the statute as it remains in force at the time of the acceptance of the notes," an argument which, if it has any value, derives it entirely from the form, and has no connection with the ubstance of the transaction, and is something like constru-

ing a statute after amendment, as if the amendment, because passed at a later date, were something separate and distinct, and not an essential and incorporated part of the statute.

And yet, Judge McLean had said, in *Woodruff* vs. *Trapnall*, 10 *Howard*, 206, "*The guaranty included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved, 'This note shall be received by the State in payment of debts,'* and that the legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument. Any one had a right to receive them and to test the constitutionality of the repeal."

The theory of the Supreme Court of Tennessee has this further consequence, that it gives rise to as many new and independent contracts as there are new holders, each requiring, for its support, a distinct consideration. As these bills pass as money, and one of them may be transferred many times in a day, frequently outside of the State, and to those who never heard of the 12th section, the imaginary consideration and contract suggested by the Court, must often be applied under very droll circumstances. The bills are passed in Canada and the United States, North and South, in Tennessee and Ohio, for all manner of purposes, honorable, dishonorable and mixed; they are lost in games of poker on the Mississippi, won in Kentucky horse races, sold as uncurrent money in Wall street, used by ladies in shopping, paid by servants over the counter of groceries, given to children at Christmas, and to every transaction, wherever it may happen, hastens the State of Tennessee, in the likeness of an angel, at least as to the

wings necessary to carry her to such remote regions and in such brief periods, and in the beneficence of her purpose, saying, "Take the bank bill; if you do, I will receive it from you for taxes, saving and reserving, however, the right, by repeal, to refuse to take it from your transferee!"

In many cases of the transfer of these bills, the new holder never heard of the State's guaranty, and gave no credit to it, so that in no sense did he take the bill at the request of the State. Whereas, treated as a special endorsement, or negotiable guaranty, the credit is given by the first taker, when the bill is issued, the State gives and gets its consideration then, the then dealing is within the State, or at least with parties cognizant, or bound to be, because dealing with the bank, of the nature of the State's relations to the bills and the bank.

The theory of the Supreme Court of Tennessee has this further and most unjust result:—that the man who is caught, by the fact of repeal, resident in Tennessee, with a small amount of these bills in his hands, may use them in future payments of taxes:—while the larger the sum he holds, the longer he will be compelled to keep it, as unemployed capital, waiting the coming of the tax gatherer from year to year, or the greater will be his loss:—while the nonresident, or one who owns no property, and pays no taxes in Tennessee, is discriminated against, by being deprived of the right of transferring the paper to tax payers, for use by them, a right which measured part of the value he gave, and constituted part of that he expected to receive when he took the bills. Thus great inequality follows. Some holders can make use of their bills, some

can not. And the greater the confidence reposed in the State's guaranty, the greater the loss. The more one has had of it, the worse he is off.

Thus far I have considered the case as if the question were new; but it was distinctly decided in *Woodruff* vs. *Trapnall*. That was mandamus to compel the receipt of notes of the State Bank of Arkansas, in payment of a judgment, recovered by the State, against Woodruff, the State Treasurer. In creating the bank, the State had agreed "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." She was the sole stockholder of the bank, and appointed its directors. She repealed the clause of the charter permitting this use of the notes. It did not appear whether Woodruff was possessed of these notes before the repeal or not. In all these particulars, that case is like this. And there are no other important features of either case. Judge McLean, in expressing the views of the majority of the Court, 10 *Howard*, 205 and 6, says: "The notes are made payable to bearer, consequently, every *bona fide* holder has a right under the 28th section, to pay to the State any debt he may owe it, in the paper of the bank. It is a continuing guaranty by the State that the notes shall be so received. Such a contract would be binding on an individual, and it is not less so on a State. That the State had the right to repeal the above section may be admitted. And the emissions of the bank subsequently are without the guaranty. But the notes in circulation at the time of the repeal are not affected by it. The holder may still claim the right, by the force of the contract, to discharge any debt he may owe to the State, in the notes thus issued. *It is argued that there could have been violated or*

impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him in his possession at the time the twenty-eighth section was repealed. It is admitted that he had the notes in his possession at the time he made the tender, and that they were issued by the bank before the repeal of the section; and nothing more than this could be required." And on page 208, he adds, "The right to make payment to the State in this paper *arises out of a continuing contract, which is limited in time by the circulation of the notes to be received.* They may be offered in payment of debts due to the State in its own right, before or after judgment, and without regard to the cause of indebtment. Whatever may be the demerits of the plaintiff in error, they do not affect the nature and extent of the obligation of the State, *and that obligation cannot be withdrawn from this paper. Into whosoever hands it shall come, it carries with it the pledge of the State to receive it in payment of its debts.*"

It is true that *Woodruff* vs. *Trapnall* was decided by five judges against four, but it is also true that it has never been overruled, but has been often affirmed. It is now too late to question it. Eighteen years have since elapsed. It furnished the standard of duty and legal obligation, during the larger part of the life of the Bank of Tennessee, and was, undoubtedly, the basis of the confidence the holders of the notes of that bank felt.

Paup, et al, vs. *Drew*, 10 *Howard*, 218.
Trigg, et al, vs. *Drew*, 10 *Howard*, 224.
Curran vs. *State of Arkansas, et al*, 15 *Howard*, 304.
Hawthorne vs. *Calef*, 2 *Wallace*, 10.
McGee vs. *Mathis*, 4 *Wallace*, 143.
Von Hoffman vs. *City of Quincy*, 4 *Wallace*, 535.

It will be observed that the Supreme Court of Tennessee do not dispute that the 12th section contained the elements of a contract. They take issue with that part only of the decision of this Court, in *Woodruff* vs. *Trapnall*, which I have italicised. It is a question, therefore, of the interpretation of the contract. Viewed in this light, it becomes of the highest importance, as it enters into the consideration of the purpose of the Federal Government, and the effect of its acts, in some of the most important events of our recent history. On its solution, will depend the question whether, in case of the repeal or modification of the acts authorizing the issue of greenbacks, and of National bank notes, that currency would at once be arrested in the hands of its then holders, certain to lose a large part of its value if parted with, or would continue to circulate as before, sustained by the confidence of the people in the Federal judiciary. For want of such judiciary under the Confederation, the Continental currency became valueless. Under the wise system of the Union, no such disaster can happen, while *Woodruff* vs. *Trapnall*, and *Curran* vs. *Arkansas* are unreversed.

If, therefore, the dark day shall come when the pressure of private calamity, or national disaster, shall have so demoralized the public mind, as to induce an attempt at withdrawal, by Congress and the Executive, from any constitutional pledge contained in the laws authorizing the issue of the United States legal tender treasury notes, or of the National bank currency, it will be by force of the decision made in 1850, in *Woodruff* vs. *Trapnall*, and in 1869, in this case, that the circulation will continue; to these cases every honest patriot will look for the proof of the impossibility

of successful repudiation, and it will be to this Court, administering the law of these cases, that resort will be had to rescue individuals from undeserved loss, and the country from dishonor.

GEO. HOADLY.

Cincinnati, Ohio, January, 1869.

ARGUMENT

OF

ROBERT L. CARUTHERS,

BEFORE THE

Supreme Court of the United States,

IN THE CASE OF

FURMAN, GREEN & CO.

vs.

P. L. NICHOL, CLERK OF DAVIDSON COUNTY COURT.

This case comes by Writ of Error to the Supreme Court of Tennessee, under the 25th Section of the Judiciary Act of 1789.

It involves the question of the constitutionality of "An Act of the Legislature of that State, passed June 10th, 1865, repealing the *twelfth* Section of the Act of 19th January, 1838, establishing the Bank of Tennessee," by which the State was bound to receive the issues of such Bank for taxes.

The defendant, NICHOL, was Clerk of the County Court of Davidson; and, by the Revenue Laws of the State, (Code of Tenn., Sec. 679) he is made the collector of the taxes levied upon merchants. The plaintiffs are wholesale merchants, in the city of Nashville, and tendered to the defendant, as such officer, on the —— day of ————, 1866, the amount of their taxes, and the bond required by law, and demanded a license to do business as merchants for that year. The tender was made in the notes of the Bank of Tennessee, issued previous to the 6th of May, 1861,—that being the day on which the Legislature passed the resolution and declaration of separation from the Union. The Clerk refused to accept it, and issue the license, because the notes were not par funds, and the said 12th

Section had been repealed by Act of 1865. Whereupon, on petition to the Hon. M. M. BRIEN, a Judge of the Circuit Court, an alternative Writ of Mandamus was obtained. At the next Term, the defendant demurred to the petition, which, having upon argument been decided against him, and a peremptory mandamus ordered, he appealed to the Supreme Court of the State. At the last Term of that Court the decision was reversed, and the petition dismissed.

I shall attempt to prove that this judgment is erroneous, and should be reversed, upon the ground that the Acts of the Tennessee Legislature, of 1865, is unconstitutional and void, so far as it operates to relieve the State from its obligation to receive the notes tendered in this case for taxes, as it "impairs the obligation of contracts," and is only valid as to issues subsequent to the repeal.

The mandamus is the proper remedy. (Code of Tenn., Secs. 3567–3575. Caruthers' "History of a Law-Suit," 586–720.)

This Court has jurisdiction, under the 25th Section of Judiciary Act of 1789, because the case involves, and must turn upon, the construction of that clause in the Constitution of the United States, which forbids any State to pass a law "impairing the obligation of contracts," and was decided in favor of the validity of the repealing Act, of 1865, violating that inhibition. The Court below did not, nor could they, place it on any other ground.

The "Bank of Tennessee" was chartered 19th January, 1838. Section 1 is as follows: "Be it enacted by the General Assembly of the State of Tennessee, That a Bank shall be, and is hereby, established in the *name and for the benefit of the State*, to be known under the name and style of 'The Bank of Tennessee,' and the faith and credit of the State are hereby *pledged* for the support of said Bank, and to supply any deficiency in the funds hereinafter specifically pledged, and to give indemnity for all losses arising from such deficiency."

The questions in this case arise on the 12th Section, which is as follows:

"SEC. 12. *That the bills or notes of said corporation originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the Treasury of this State, and by all tax-collectors and other public officers, in all payments for taxes, and other moneys due to the State.*"

The notes tendered in this case were issued under, and in accordance with this Section, as the petition expressly alleges. They had never been refused by the State for any demands against the people, from the date of the charter up to the 10th of June, 1865, when the said 12th Section was repealed by the Legislature—almost thirty years. Thus, for near a generation, the State kept her faith, and was true to her contract. I am persuaded that nothing but the coming in of a new generation, and the de-

moralization of the war, could have induced her to bring this stain upon her honor.

If the Charter created a contract between the State and the note-holder, it is clear that the last-mentioned Act, violated, or "impaired the obligations of that contract," as to all notes *issued* before the repeal, and consequently infringed the clause in the Constitution of the United States, as well as that of the State of Tennessee, on that subject. That a "contract" was constituted, would seem to be incontrovertible from a simple statement of the case. The Bank was established, as is expressly enacted, in the 1st Section, "for the benefit of the State." It was to be its financial agent, in all its fiscal operations in conducting the Government, and its system of Common Schools, and Internal Improvements. It could not be efficient, or profitable, without inspiring full confidence in its issues. The State therefore announced, in the most solemn form in which a State can speak, that its faith and credit were pledged for the support of the Bank, and to make good all losses in case the funds provided should prove insufficient for the purpose. That would seem to be enough to secure the ready and free circulation of the issues among the people, for all men would feel sure that a great State would never be guilty of a violation of its plighted faith. Such an imputation would be unpatriotic, and almost treasonable. What additional guaranty could be required? But, still further, to inspire confidence and give currency to this paper, and put it above the issues of all other banks, and make it at once equal to gold and silver, the Legislature binds the State in the strongest, and most explicit terms, in the 12th Section, to receive it for all moneys due the State, whether for taxes, or otherwise. Under these pledges, guarantees and solemn assurances, the notes passed into circulation, and a portion of them winged their way, in the due course of business and trade, into the hands of FURMAN, GREEN & Co., who offer them to Mr. NICHOL, as one of the tax collectors of the State, for the taxes due from them, and they are refused because they were under par, and the State had withdrawn her guarantee, or annulled its promise and contract to receive them, on the 10th of June, 1865, by the repeal of that part of the Charter. This the Constitution forbids. If she had made a contract to receive them under which they were set afloat among the people, it could not be revoked or impaired by any action of hers. Her act of repeal is simply a nullity.

What is the case? The State creates a Bank for *its own benefit;* the profits will depend upon the free circulation of the notes it may issue, as currency. To secure this object, she binds herself not only to guarantee their payment, but to receive them for all the taxes she may levy, or money that may be due to her on any other account; they pass out into the channels of trade under these assurances, and have a preference over all other paper money, because none other will answer the same purposes;—

the State has bound herself to take no other in place of the lawful currency in the payment of public dues. They go out upon their mission,—an eagle on the wing representing an eagle in the chest. What element of a contract is wanting in this transaction? There is a distinct promise to do a thing upon a sufficient consideration. All the people act upon this promise, and give their property, labor and services, for the notes, as equal to gold or silver.

But we are not left to abstract reasoning, or an original construction of the Constitution on this subject. The point has been expressly decided by this Court in 1850, in the case of Woodruff *vs.* Trapnall, 10 Howard, 190. That case not only settles this, but every other question presented in the case now under consideration. The Judges were divided in opinion, and upon this, the Court below seem to lay some stress, but it is nevertheless an adjudication of the Court which has never been overruled, but constantly adhered to, and several times cited with approbation. It is presumed that it is too firmly fixed now, as authority, to expect this Court to disturb it. Even the dissenting Judges would now yield to it, as authority. It would seem upon examination of the facts of that case, that a stronger one to test the doctrine could not well be presented. Surely, if a mandamus was ordered in that case, it can not be refused in this.

I copy the statement of the case from the dissenting opinion of his honor, Judge GRIER:

"His bond was given to the State of Arkansas on the 27th October, 1836, before the Act incorporating the Bank of Arkansas, was passed. His contract, as it appears on the face of his bond, is to pay $300,000, lawful money of the United States; subject to a condition which is forfeited. He was treasurer of the State, and between the date of his bond, and the 21st December, 1838, he received large sums of money, and among others, the sum of $286,757 in drafts from the Secretary of the Treasury of the United States. Of these moneys, a balance remained in his hands, which he refused to pay over, and a suit was brought on his bond in 1840; and on the 23rd January, 1847, final judgment was recovered for the sum of $3,359; and an execution having issued for the same, Woodruff, for the first time, in February, 1847, tendered to the Attorney for the State, not lawful money of the United States, which he had contracted to pay, and for which judgment was given against him, but notes on the State Bank of Arkansas then, and now insolvent, and the notes almost worthless," page 209–10. On the same page he states: "Now, for seven years and upwards, after the default of the plaintiff in paying over money he had received, he was permitted to pay in notes of this Bank, but in all this time, he made no tender of payment in such notes. When sued, he makes no tender of notes, pleads no set-off, but after judgment of the Court that he shall pay *money*, he claims a right to satisfy the execution by handing over that which is not money."

Now, if that sort of case is decided for the plaintiff, on the ground that the State was bound by her contract created by the charter, can there be any doubt about this? Here the demand of the State is not for

money actually received in coin, and a defalcation, with seven years' litigation, but for a tax just levied and due. It will also be observed in that case, that the bond sued upon, was entered into before there was any pledge on the part of the State to accept that currency from her debtors, as the Bank was not then chartered. Here the debt accrued more than twenty years after the Bank was created, and its notes in circulation, under the pledge that they should be received for taxes, as they had been, without question, during all that time. How can we tell that the plaintiffs would have entered into a business that bound them to the State for so large a sum in taxes, but for the contract of the State to receive this money? But, even in that case, strong as it was, we may infer from a part of the reasoning in the dissenting opinion, that if the Arkansas charter had been like ours, there would have been no division of the Court.

At page 215, Judge GRIER says, in reference to the State: "She has nowhere agreed to guarantee the solvency of the Bank, or be liable for its issues." On page 217, he says, in regard to the attempt to make the State receive their notes, "although they never directly pledged the faith of the State or agreed to be liable for a single dollar issued by the Bank." In the charter under consideration in this case, in the very first section, the State makes these pledges in the strongest and most unequivocal terms.

Then, if that case is law, and who can controvert it? can there be any doubt as to the result of this? It has been ever since recognized as a sound and binding decision, and has never been questioned before.

At the same Term, in two cases, Paup *vs.* Drew, and Trigg *vs.* the same, page 218 to 224, the same principle is again affirmed. Though they went the other way, upon the ground that the notes sued upon, were for trust funds, and expressly payable in specie, on their face. They were for the sale of School Lands, and made payable to the Governor in trust. That was in no sense, money due to the State, and consequently did not fall under the 28th Section of the Charter of the Bank of Arkansas, nor would such a claim be embraced by the 12th Section of the Charter of the Bank of Tennessee. This is entirely a different case.

In Curran *vs.* the State of Arkansas, 15 How., in 1853, the same principles on the subject of contracts, and Legislative infraction of them, are recognized, but upon a different aspect of the question.

But as late as 1864, in Hawthorn *vs.* Calif, 2d Wallace, 21, the case of Woodruff *vs.* Trapnall, is expressly recognized as authority in the opinion of the Court, delivered by his honor, Judge NELSON, who dissented in the original case, but of course, regarded it as established authority, though against his opinion at the time. He says:

"Without stopping to discuss the question upon the clause of the statute, we think that the case falls within the principle of Woodruff *vs.* Trapnall, and Curran *vs.* the State of Arkansas, heretofore decided in this Court."

After stating that case, he says:

"The Court held after *very full examination*, that the clause in the Charter," (the Bank of Arkansas,) "constituted a contract with the holders of the notes on the part of the State, and that the *repealing Act was void*, as impairing the obligation of the contract."

At the last Term of this Court, the same principles were recognized in the case of McGee *vs.* Mathews, 4th Wal., 143, and of Von Hoffmans, *vs.* City of Quincy, Ib. 535. The first is from Arkansas, and the other from Illinois.

So, we may regard the case of Woodruff *vs.* Trapnall as firmly settling the principles which must govern this. Was there ever such an accumulation of cases, on a single point, before this Court? But if any additional authority is needed, we have it in the opinion of the Supreme Court of Tennessee, on the main point in the case. It is there distinctly held, that, by the 12th Section, a contract was created between the State and the holders of the notes, binding the former to receive them for taxes, and that the repealing Act of 1865 could not impair the obligation of that contract, as to such persons as held them at *that time*. But, it is further held, and on that the case is made to turn, that such contract does not extend to a *subsequent holder*. There can be no better, or stronger authority, than this in support of the position that the Section of the Charter in question, constitutes a contract between the State and all the holders of the Bank Notes; and that it was not in the constitutional power of the Legislature to annul it, so as to affect notes then in circulation. For those *issued after* the repeal, as all admit, the State would not be bound, as her power to withdraw her guarantee, as to future issues, is not controverted. But the Court below held that the contract does not extend to those who may have received the notes subsequent to the repeal, though issued before. It would seem strange that the high authority of this Court should be disregarded, on a point so distinctly adjudicated. In the case of Woodruff, 10 How., 206, this Court most explicitly meets that question, and holds that no such distinction can be made. It is there said:

"It is argued that there could have been violated or impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him, in his possession *at the time* the 28th Section was repealed. It is admitted he had the notes in his possession at the time he made the tender, and that they were issued by the Bank before the repeal of the Section; and nothing more than this could be required."

Again, on the same page, it is said:

"The guaranty included all the notes of the Bank in circulation, as clearly as if on the face of every note the words had been engraved, '*This note shall be received by the State in payment of all debts.*' And that the State could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument. Any one had a right to receive them, and test the constitutionality of the repeal."

Again, on page 208:

"And that obligation cannot be withdrawn from the paper. Into whosesoever hands it shall come, it carries with it the pledge of the State to receive it in payment of its debts."

The only question then is, whether this Court will adhere to its own decisions, or adopt that of the Tennessee Court on this point. It is impossible to adopt that of the latter, without overruling its own. Both cannot stand. They cannot be reconciled. No legal mind has sufficient acumen to show even a plausible distinction in principle between the cases. The abortive attempt of the State Court to do so, is evidence of the truth of this assertion. It is there said that the fact that the State of Arkansas owned all the Stock in that Bank, and in the Bank of Tennessee, the School Fund, and the surplus revenue, constituted part of the Stock, makes a difference sufficient to change the result. It is difficult to see the force of this argument, if any it has. It is not asserted that the State did not have the control of these funds, and had a right to use them as she thought best for the benefit of the trust, being accountable for loss by the want of fidelity. It is not charged that this was a misapplication or breach of trust. The State could loan for ~~accommodation~~, as she had done, or authorize the Bank to do it. But if it were, how could it affect the force of the guaranty of the notes, or the pledge to receive them for the taxes? That is what constitutes the contract, and the source from which the State derived the capital, cannot affect the question. It is none the less a contract. The Charter pledged it all, and the plighted faith and honor of the State besides, to those who would receive the notes, and in addition to all that, made them equal to gold and silver in the payment of taxes. Can the State, one of the contracting parties, say to the other—the noteholder—I am not bound by my contract, or there was no contract binding upon me, *because* the funds I provided for the redemption of the notes were not all mine, and were pledged by me improperly? Surely, such a position cannot be maintained—it is too absurd. The State certainly had the power to control the School Fund, as well as the surplus revenue, and use it in banking, if the Legislature thought it best for the cause to which it was dedicated. Whether the State would be accountable as Trustee for its loss, or misapplication, is a question with which we now have nothing to do, and it would only be speculation to discuss it. It may come up in the future, and then it will be time enough to consider it. It is no matter to the noteholder where the State got the capital of her Bank,—whether she borrowed it upon her bonds, used the School Funds under her control, or what is called the surplus revenue deposited with her, by the United States, under the Act of Congress, or made it up of all of *them, as she did.* The Bank was established for her benefit, managed by her officers and agents, and in all respects, her fiscal agent. It was her enterprise, and the profits were her's, and so must the losses be.

She pledged her faith to make and keep good its issues, receive them from all her debtors, and make good all losses that might result to the people from mismanagement, or insufficiency of its means. It amounted to an insurance to the noteholders against all contingencies. No matter what might come, he has to be made safe and sure. Under such circumstances and solemn guarantees, and pledges, on the part of a great State, the notes of the Bank of Tennessee were sent forth as currency, among the people. They were sought by all men, as the safest paper in the State. They were better secured than any other, because, in addition to the ample stock provided for their redemption, all the property of the State was pledged, being subject to the taxing power to make them good, and they were equal to gold, for all the revenues of the State. If a man had money to lay up for his children, or the guardian for his ward, this was the kind he would seek. If by civil war, or financial crisis, banks were endangered, all men, whether of large or small means, would cling to this currency with tenacity, because, if the Bank failed, and its capital should be swept away by the disasters of the times, the State stood bound by solemn contract, written down in the law, to make it good and receive it for taxes.

Such was the feeling, and the course of the people of Tennessee on the approach, and during the pendency, of the great civil tornado through which the country has just passed, which prostrated everything before it, and left but a wreck behind. Old men held on to it with as firm a grasp as they did their gold. They never allowed themselves to doubt that their State would in any, and all events, keep its word, and perform its promises, no matter what might come. No one imagined when the 12th Section was repealed, that the State would bring upon itself the reproach of attempting to repudiate its contract, and violate its plighted faith by refusing to make good the paper already issued, to which the contract attached. Such a course would blast the good name of an individual, and destroy his credit. It is deeply to be deplored that the highest Judicial tribunal in the State felt it to be their duty to sustain this palpable breach of faith, and deliberate repudiation of contracts. It is to be regretted, not only for its wrong and injustice, but because of its blighting effect upon the credit of the State, and the loss of confidence in the inviolability of public faith. It would have been far better for the State and its citizens to have paid the two or three millions of the notes yet out, in gold, raised by taxation of the people, as much as they are otherwise oppressed, than to have struck so severe a blow at the public credit, as well as common honesty and morality. Nothing is so demoralizing to a people as such examples by the government. All must remember the effects of the Mississippi repudiation on the credit of that State.

It is far from my purpose to make any imputation upon the honesty of intention and intelligence of the Supreme Court of my State. I only

express my own views on the question in such terms as my feelings and judgment dictate. It seems that the Supreme Court of Arkansas fell into the same error. These cases, and others of like character, prove the wisdom of our fathers in providing that this high tribunal, away off from, and above all local feelings and influences, which often warp the most honest minds, should have a supervision over the State Courts in the class of cases designated in the 25th Section of the Judiciary Act of 1789. If it were not for this, the law would have no uniformity and consistency. The Constitution speaks to both tribunals with the same force, that "no law shall be passed impairing the obligation of contracts." If the State Courts disregard, or misconceive the high injunction, it is the province and duty of this Court to correct them, and protect with a strong hand, the fundamental law from infraction. It did so in the Arkansas case in 1850, and will be the more ready to do so in this; both because it is right, and to preserve uniformity in the law. Even if this Court did not entirely approve that decision, it would not now disturb it, for the sake of the harmony and consistency of the law. It is a precedent, an authority, and cannot be disregarded, without breaking in upon the rule of *stare decisis* by which all judicial tribunals have been governed for centuries. So, I conceive, that unless a distinction in *principle* can be shown between this and the case decided in 10 Howard, there is no necessity for further argument. But it is a question involving millions, and in which a whole people are interested, and nothing pertinent should be omitted.

It will be seen by reference to the opinion in this case, that the reasoning of the dissenting Judges in the Woodruff case is pretty much adopted. It is said, for instance, that as the Legislature had power to repeal the 12th Section, this was known to those who received the notes, and therefore they took them, subject to that power and contingency. But still they hold that it was a contract with all who held the notes before the repeal. The answer to this is: that they also *knew* that according to the Constitution, this could not be done so as to affect subsisting contracts, and that protected all notes issued before the repeal. If they are bound by the presumption that they knew one part of the law, we must presume that they knew it all, and more particularly the fundamental law. So, the notes were taken with a knowledge that it was in the power of the Legislature to repeal the charter, or any part of it, but that such repeal could not release the State from its contract to receive those then in circulation for taxes. That argument thus destroys itself, and is therefore without force and worthless.

Near the close of the opinion, the Court seems to intimate that it does not appear in the petition "that the notes tendered had been lawfully issued, or in other words, that they were the legitimate issue of the Bank, and that Furman had become the *bona fide* holder of them before the re-

peal." Now, with great deference, this is a palpable misconception of the facts. In the petition, at page of the record, it will be seen that it is stated: "That said Bank notes this day tendered to said Clerk, as above stated, were issued by the Bank of Tennessee, *as provided for in the 12th Section of the said charter*, and payable to bearer; that said corporation is still in existence, and the charter unrepealed." The petition had before alleged that the plaintiffs, "then," referring to the time they applied for license, "tendered and offered to pay said Clerk the sum of $3,434 55 in the notes and issues of the Bank of Tennessee, issued prior to the 6th of May, 1861, in full payment and discharge of said sum of taxes due from him to the State of Tennessee, accrued and become due to the State since the said 28th of August, 1865, up to this date, which sum in said notes and issues of the Bank of Tennessee he refused to accept and receive, because the same were not at par."

The Court would presume from this statement alone that they were genuine, and lawfully issued, as no objection was made on that score. And it is alleged that they were issued before the 6th of May, 1861, because the Legislature in 1865 had repudiated all subsequent issues—during the rebellion. But if that were not so, though there can be no doubt of it, the subsequent statement above extracted removes all difficulty.

After all, then, there is no conflict in the law as held by this Court in the case of Woodruff *vs.* Trapnall and the Supreme Court of Tennessee in this case, except on a single point. Both cases agree that the respective charters created a *contract* between the State and the holders of the notes issued by the Banks respectively, no matter how remote the holder may be from the date of the issuance. Though they may have passed through a thousand hands, and been out in circulation twenty years, or up to the time of repeal, the contract goes with them, and the obligation of the State still subsists, and the guarantee attaches. But the Tennessee Court holds that the repeal of the law, though it cannot affect the obligation between the State and those who then held the notes, yet it arrests them there, and does not follow them into the hands of subsequent holders. Therefore to hold the State to its liabilities, and bind her by the admitted contract to receive them for taxes, it must be shown that they were held at the date of the repeal. If this Court has constantly held the reverse, it would seem unnecessary, if not improper, to impose upon it an additional argument on that point at this late day. It has been before shown that the Woodruff case is explicit on this point. If it was open for debate there surely would be no difficulty upon it. It would seem too clear in reason and law, to admit of controversy, that if that transaction amounts to a contract on the part of the State to receive the notes sent out by its Bank for all debts due to her, she cannot divest herself of that obligation until the notes for which she has obligated herself are redeemed. It can make no difference

who may hold them, or when obtained, her contract and guarantee goes with them; it adheres to the paper and cannot be separated from it. It must inevitably follow that if the State was bound by contract to receive the issues of her Bank from any one who might hold them, between the date of the charter in 1838, and the 10th of June, 1865, she continued liable as long as they were in circulation, no matter into whose hands they might come, being payable to bearer, unless the Legislature had the power to "impair" or destroy the obligation, and this is forbidden by the supreme law. The Supreme Court of Tennessee, then, admits too much and goes too far, to save the State from her liability. If she was ever bound, as is admitted by the Court, she continues bound until her contract is performed, by taking in the paper. There is no sound principle or reason by which the distinction can be maintained. As well might an individual who had given out his notes payable to bearer, with a stipulation to pay them in goods on presentation, or to receive them for any debts that might be due to him, insist that he could at any time he chose withdraw, or annul, his obligations as to all persons who did not hold them at that time. Or to make the case more analogous, let it be supposed the notes are issued by another person, and to give them ready circulation and strengthen confidence, he promises in writing to receive them for all debts due to him without limitation of time. Could he at pleasure annul his guaranty, and throw off such obligation except to persons who might then hold them, without any such condition in his contract?

But let us illustrate by another supposed case of greater magnitude. The act of Congress establishing the system of National Banks, in order to give them undoubted currency, and to make them equal to the legal tender Treasury Notes, familiarly called "Greenbacks," contained a provision, Section 23, making them receivable at par "in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports." And likewise for all claims against the Government except for interest on the public debt and the redemption of the currency. This clause in the charter, together with the requirement that the bonds of the United States should be deposited with the Government to redeem the notes to be issued, accomplished the object which the wise men and able statesmen, who conceived and matured the system, intended. Without a specie basis, and contrary to the prediction of many, this new and untried scheme of supplying the vast fund necessary for the conduct of the gigantic war then raging by land and sea, which seemed likely to fail for want of this "sinew of war," proved to be a complete success, and put to flight all the former theories of banking. It was a fortunate device, and could only have been conceived by great and inventive minds. It was put in motion amidst the jeers and taunts of bankers. Sixteen hundred or more of these institutions sprang up all over the land as if by en-

chantment, and three hundred millions of currency was supplied, to the great relief of the national finances, and the same at once became equal to the far-famed "Greenbacks," the invention of the same great intellect, and drove out of circulation all the issues of local Banks which lacked the stamp of nationality, by sinking them far below the level of this new currency. Why was this so? They were not convertible into specie, which was before thought indispensable to create confidence in bank paper. It was simply and solely because the Government bound itself to receive it from the holders as money. Every man felt that he had a binding contract with his Government that this paper would always be good for his taxes. As the Government set the example of giving it credit, the people followed with confidence. They had the written assurance of a great nation that it should be good. Who could hesitate to give it credit after such a pledge? No one ever feared that his Government would violate its word and repudiate its contract. And if such a thing were ever considered possible, by the change of policy in the passage of power from one party to another, they knew the Constitution forbade the enactment of any law "impairing the obligation of contracts."

Now, we know from the history of the times, that the question of the repeal of these charters is agitated among politicians. Suppose that policy should succeed, or at least to the extent of the repeal of that part of the charters which makes these notes receivable for taxes, would any one contend that such an act would be held by the Courts to be constitutional? Not if they have read the decisions of this Court in the cases before cited. Is it in the power of Congress to strike down, and render next to nothing, the three hundred millions of dollars in the hands of the people, issued by its procurement, and with its recommendation and indorsement? Did they not win their way into public favor, and engender faith and confidence by this reliance upon the contract of the Government to accept them as equal to gold and silver in payment of all demands against the people? But would any one argue that the contract to receive them would only be violated as to those who might hold them at the time of the repeal, and not as to those into whose hands they might afterwards pass? This would at once arrest their circulation and destroy their value, to the great detriment of the public. It would also be in contravention of what was held in the Woodruff case, and thus the people would be misled by the solemn and published adjudication of this Court, to their great injury and loss. Not doubting that to be the law, they would circulate as freely as before the repeal, and more so, because no more could be issued, and the amount would be constantly diminishing.

Would the case I have supposed differ in the least from the Tennessee case, now under consideration? If this case is decided against the plaintiff, it would be a distinct authority for the other, if it should ever arise.

If Tennessee can violate, and be released from her contracts, surely the United States may be. There is no distinction in principle. The Constitution speaks as distinctly in one case as the other. Who is prepared to establish such a doctrine as this? Would it not equally sustain the repudiation of all the bonds of the Government, and sink them into ruinous depreciation?

An argument was made below, against the petition, upon the ground that it did not state that the notes endorsed, were issued before the 1st of May, 1858; that being the time when the Code went into effect, which, it was asserted, repealed the 12th Section of the Act of 1837, by implication. The Court below, held that position untenable. But as it may be again assumed here, it may not be amiss to notice it briefly. This would not perhaps affect the question, even if the position were correct, as there is nothing to show that these notes were issued after May, 1858. But, be this as it may, it is very clear that the Code did not repeal the 12th Section. The Legislature did not so understand it, or they would not have passed the Act of June, 1865.

All the authorities hold that implied repeals are not to be favored. Also, that where both Acts can stand together, there is no repeal by implication, 1 Head 115, 2 Meigs Dig. 972.

Section 603 of the Code, which is relied upon, provides that, "The collectors of taxes shall in discharge of public taxes, and other dues to the State, besides the constitutional and lawful currency of the United States, receive such bank notes as are current, and passing at par in this State." But this may well stand with the Act of 1838, ordering the issues of the State Bank to be received. It only meant to compel collectors to take the notes of other Banks, in or out of the State, which were circulating at par, for the convenience of the people. The object was to enlarge, not restrict the kind of funds to be received. Without that, the collector could receive no others than the notes of the State Bank, or gold and silver, with safety to himself, or he might arbitrarily reject all other paper, though at par, to the great trouble of the tax payer. This was to enable the people not only to pay in the notes of the Bank of Tennessee, but in any others, at par at the time. This was evidently the object in view. But there is another conclusive answer. The Code provides in Section 41, that all *public* Acts *not* included therein, shall be repealed, but in the next Section, it provides that "Acts of incorporation heretofore passed, are not repealed, unless it be herein expressed."

The Acts of 1838, is an "Act of Incorporation," and therefore expressly saved from implied repeal by the Code.

The guaranty of the State, then, was not withdrawn till 10th June, 1865. The notes tendered were issued before the 6th of May, 1861, and consequently escape the repudiating act of 1865, as well as the repealing

act of the same year. The question as to the power of the Legislature to strike down the issues since the 6th of May, 1861, and relieve the Bank from liability for the same, is not now involved. We avoid that point, by the allegation that the notes tendered in this case were issued before that time.

It has been said that a decision against the State would destroy her revenue, and leave her without the means of supporting and carrying on the State Government. If this were literally true it could not affect the question, as the law must be administered and the Constitution sustained though the wheels of Government should stop, or even the "Heavens should fall." But this paper is not worthless. It sold for fifty cents in the dollar a week before this decision was made, and for thirty-six cents the day before. If the judgment of the Court had maintained the faith of the State by declaring it receivable for taxes, it would have been at once but little, if any, below the national currency. It is even now, under the general confidence that this Court will hold the State to its contract, selling for thirty-three cents in the dollar, or held out of market. It is not then, worthless, as the notes of the Bank of Arkansas were, when the case of Woodruff was decided. The people generally hold on to it, with an abiding confidence that the same Court which held Arkansas to her contract, will not allow Tennessee to escape from her obligation. It would be better for the State to live upon credit for ten years, than to lose the confidence of her people and the public, in her honesty and fidelity. If a loss of credit cripples the operations and clouds the prospects of an individual, how much more does it blast the fame and obstruct the great enterprises of a State or nation? All our great improvements are accomplished by credit. Much of the capital is derived from abroad upon the bonds of the State. Is it not to the interest of all that the credit and faith of the State should be scrupulously maintained? Can any temporary gain compensate for the loss of public credit?

There never has been a time in the history of this Government when it was so vastly important to protect the public credit with so firm and strong a hand. The least suspicion costs the nation millions by depreciation of its securities. The decision below in this case has inflicted a wound upon the credit and honor of the State, heretofore unblemished, which can only be healed by this tribunal of last resort. It will then be seen that although local considerations may unwittingly lead State Courts into errors of judgment, yet the Constitution has wisely established a tribunal too high for such influences, where those errors will be corrected, and all laws invading the obligation of contracts declared to be void, and the States held to their engagements and plighted faith without regard to consequences, and in spite of State legislation and local decisions. Let this be made manifest, and State securities will be sought with avidity by capital, and our country flourish.

It was argued below, and may be here, that no Legislature had the power to so tie up the hands of their successors as to deprive the Government of the revenues necessary for its support, and that such would be the effect in this case if the State should be held bound by the act of 1838, to receive its taxes in the depreciated paper of the Bank of Tennessee.

The position is certainly correct that all general legislation is subject to repeal or modification, and that one Legislature cannot deprive another of the power to levy taxes and provide revenues for the support of the Government. But it is equally true that when legislation assumes the form and nature of contracts, which it may well do, often does, and has done in this case, it is as binding upon the State as if it were a contract between individuals. Fletcher *vs.* Peck, 8 Cranch, 87. Such legislation is as irrevocable as the laws of the Medes and Persians in days of yore. Charters of private corporations are generally of this character. And so are all rights vested under charters of any other description, previous to their repeal. If contracts are entered into under a repealable charter, or if they arise out of its provisions, they are beyond the power of the Legislature. It cannot destroy or "impair" them.

Another point is suggested, though not elaborated, in the opinion of the Court below, to distinguish this case from that of Woodruff *vs.* Trapnall, viz: that in this case the claim of the State against the relators accrued after the repeal of the law, and in that it was before. In this case the demand of the State is for the tax upon the occupation of merchandising for 1866—the year after the repeal; in that it was for money received by Woodruff as State Treasurer before the Bank of Arkansas was chartered. So at the time his liability accrued there was no contract on the part of the State to receive the notes of the Bank from their debtors. The notes tendered in that case were issued after the liability arose and when there was no obligation on the part of the State to receive payment in anything but gold and silver. But in this case, when the notes tendered went into circulation, there was a standing contract that they should be received for all dues to the State. Is it not clear that this is much the stronger case? The guaranty goes with the notes—the obligation adheres to them into whosesoever hands they may go, without any reference to the debt or the time when it was contracted. It applies to all debts due to the State, as long as any of said notes may be out and remain unredeemed. This point would seem too clear to allow of argument, and is only noticed because it is glanced at in the opinion of the Court below. If it is true, as is so distinctly held in the leading case, so often referred to in this argument, that the obligation of the State arises in favor of any one who holds the notes, then it certainly makes no difference at what time they were obtained, or when the claim of the State originated. The only questions that can be asked are: 1st. Is it a debt due the State? and 2d. Were the notes offered in payment issued before the repeal of the law?

So whatever may be our starting point, or whatever process of reasoning we adopt, we are conducted to the same conclusion, that is, that by the 12th Section of the Charter of the Bank of Tennessee, the State bound herself by contract with those who might at any time receive its issues, put in circulation before the repeal on the 10th of June, 1865, that they would be taken in payment of taxes, or other dues to the State, and by the Constitution of the United States the obligations of this contract cannot be impaired. She bound all her Collectors to receive that currency. All we ask in this proceeding is, that Collctor P. L. Nichol be compelled by the mandate of this Court to do his duty by complying with the law requiring him to receive the notes of the Bank of Tennessee for the State taxes due from petitioners.

Supreme Court of the United States.

DECEMBER TERM, 1868.

FURMAN, GREEN & CO.,

PLAINTIFFS IN ERROR,

VS.

P. L. NICHOL, CLERK OF THE COUNTY COURT OF DAVIDSON COUNTY, TENNESSEE,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF TENNESSEE

ARGUMENT OF HORACE H. HARRISON,

FOR DEFENDANT IN ERROR.

Powell, O'Brien & Co., Prs.

Supreme Court of the United States.

DECEMBER TERM, 1868.

FURMAN, GREEN & CO., PLAINTIFFS IN ERROR,

vs.

P. L. NICHOL, CLERK OF THE COUNTY COURT OF DAVIDSON COUNTY, TENNESSEE, DEFENDANT IN ERROR.

Statement of the Case.

The plaintiffs in error, Francis Furman and Francis W. Green, in August, 1866, filed their petition in the Circuit Court of Davidson county, in the State of Tennessee, against the defendant in error, Philip L. Nichol, who was clerk of the County Court of said county, and one of the collectors of State taxes, for a mandamus to compel the latter to receive from the former $3,535 58 in the notes and issues of the Bank of Tennessee, issued prior to the 6th day of May 1861, in full payment of that amount tendered by plaintiff, as due from him to the State of Tennessee, for taxes as a merchant, for the year ending the 28th of August, 1866, and to compel the defendant in error to issue to plaintiffs in error a license as merchants, the said Green having entered into partnership with Furman, on the 1st day of August, 1866.

The petition alleges the application for the license, the tender of the bond required by the laws of Tennessee, and

a sworn statement of invoice cost of all the goods purchased by Furman, upon which statement there was due to the county of Davidson the sum of $883 65, which sum was tendered to the defendant in error in legal currency of the United States, which he refused to accept, unless said Furman would also pay him the State taxes in like currency. That upon said statement, there was also found to be due to the State of Tennessee the sum of $3,534 58, and that said Furman tendered to the defendant in error, and offered to pay him said sum in the notes and issues of the Bank of Tennessee, issued prior to the 6th day of May, 1861. That the defendant in error refused the same because said notes and issues of the said bank were not at par, and refused to accept the bond tendered, and to issue to plaintiffs in error a license, because Furman had not paid said State tax in par funds, and had only tendered and offered to pay the same in said issues of the Bank of Tennessee, in which issues he insists he had a right to pay said State tax.

In said petition the charter of the Bank of Tennessee is set forth, and particularly the 12th section of the said charter, to wit, the act of the general assembly of the State of Tennessee, passed January 19, 1838, entitled "an act to establish a State Bank, to raise a fund for internal improvements, and to aid in the establishment of a system of education," the said 12th section being in the following words, viz:

Section 12. "Be it enacted, that the bills or notes of said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the State and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State."

Said petition further states, that the bank notes tendered were issued by the Bank of Tennessee, as provided for in said 12th section of said charter, and payable to

bearer; that the corporation is still in existence and the charter unrepealed; that said bank was organized and issued its bills or notes under the provisions of said charter, which circulated as money and legal currency.

"That said charter was a contract made with the people of the State, and every person into whose possession the said notes and issues of said bank might come, that the same should be received by all collectors of taxes for dues to the State of Tennessee, and it is not in the power of the legislature of the State of Tennessee to impair or annull the validity and binding force of said contract."

The petition also states, that the act of the legislature of Tennessee, passed on the 16th February, 1866, entitled "an act to wind up and settle the business of the Bank of Tennessee," assumed to appropriate the assets of the bank to purposes other than the payment of its debts and redeeming its bills and notes outstanding in the hands of the holders, and said act is referred to and made a part of the petition. Petitioners charge in their petition, that said act, so far as it assumes to withdraw the capital of said bank and branches, and its assets and property, from the redemption of its notes and the payment of its debts, is unconstitutional and void, and that the capital and assets of said bank and branches are a trust fund, first for the benefit of its note holders, and second for its creditors.

A writ of mandamus *nisi*, issued by order of the Hon. M. M. Brien, judge of the 9th judicial circuit of the State of Tennessee, which was duly executed on the defendant in error, but which, although directing the sheriff of Davidson county to read the same to the district attorney of the State for that circuit, was not made known to the district attorney.

To the petition the defendant in error filed a demurrer, setting down for causes of demurrer—

First. That said petitioner does not show that there was a contract between the State of Tennessee and the said pe-

titioners, or either of them, that the notes of the Bank of Tennessee, held by petitioners, should be received in payment of taxes due to the State from said petitioners.

Second. That said petitioners have failed to show, in their said petition, that they became the holder of the said notes, the issues of the Bank of Tennessee, before the passage of the act of the general assembly of the State of Tennessee, passed in 1858, entitled an act to revise the statutes of the State of Tennessee, (title 4, ch. 5, article 2, of the code of Tennessee,) *or* that they became the holders of said notes before the passage of the act repealing the charter of the Bank of Tennessee, passed on the day of 1866.

There was a joinder in demurrer, and at the September term, 1866, of the Circuit Court of Davidson county, on argument, the demurrer was overruled, and the defendant in error declining to plead, by the judgment of said Circuit Court, a peremtory mandamus was awarded, "commanding the defendant in error to receive of the plaintiffs in error, in payment of plaintiff's State tax, as merchants, the notes or issues of the Bank of Tennessee, issued prior to the 6th May, 1861, *and to issue to the plaintiffs a license,*" and from the opinion of the State Circuit Court, overruling said demurrer, the defendant in error prayed and obtained an appeal in the nature of a writ of error to the Supreme Court of the State of Tennessee.

At the December term, 1866, of the Supreme Court of the State of Tennessee, said court being of the opinion that there was error in the judgment of the State Circuit Court, in overruling the demurrer in the cause, reversed said judgment, sustained the demurrer and dismissed the petition, and gave judgment against plaintiffs in error for costs, from which judgment of the Supreme Court of Tennessee the plaintiffs in error in this court, (defendants in error in the State Court,) at the same term, prosecuted the writ of error in this cause to this court.

Argument.

1. *There was no contract between the State of Tennessee and any one at the passage of the act, under the 12th section, but said section was simply a proposition made by the State which, if accepted by any one taking the issues of the bank upon the faith of the provisions of that section, was binding on the State so long as that section remained unrepealed, and the proposition outstanding or unwithdrawn, and no longer.*

No one had become the holder of any of the notes of the bank when the 12th section of the act of 1838 went into effect.

There was, therefore, no person who, at the date of the passage of the act, could have become a party to a contract with the State under the 12th section. No contract can be said to have been made with the bank, for the bank, as a corporation, took no franchise, was vested with no right, and could acquire none under this 12th section. And even upon the definition of a contract, given by the Chief Justice in Sturgis *vs.* Crownshield, 4 W., 197, that a contract is an agreement in which a party undertakes to do or not to do a particular thing, yet the agreement in the 12th section of the act of 1838 pre-supposes that persons will become parties to the agreement, and it cannot be said that one who is not a party to it can claim to enforce the obligation thereof. And this will appear upon an examination of the best received definition or recital of the essentials of a legal contract, to wit:

"First, the parties, for we cannot conceive of a contract which has no parties; second, the consideration or cause of the contract; thirdly, the assent of the parties, *without which there is in law no contract*; and fourthly, the subject matter," &c.

1 Parsons on C., P, 8.

And even if this 12th section is treated as a guaranty on the part of the State, the contract of guaranty, like every other contract, implies at least two parties, and requires the agreement of both parties to make it valid.

The provisions of the 12th section of the act of 1838 cannot be said to be a guaranty. It was not an agreement or undertaking to assume or pay the notes of the Bank of Tennessee, but to receive these notes in payment of taxes and dues to the State. It cannot be said that there was the essential feature or element of mutuality in the transaction until the notes of the bank were taken, under and upon the faith of the undertaking on the part of the State, contained in the 12th section. The obvious import of the provision, and the intention of the State, was to make the notes current. The State was incorporating a bank, in which the State was interested at least to the extent of fostering and building up its educational and internal improvement interests.

The State did not own the bank, as I shall hereafter show, but contributed the capital (including the school fund held by the State in trust for the children of the State) and chartered the corporation known as the Bank of Tennessee, in order to promote the educational and internal improvement interests of the State, and to create a financial and fiscal agent of the State.

The State did not, by the 12th section, say "I will guaranty the payment or redemption of the notes of the bank, and the faith and credit of the State is pledged to do that, but I desire to make the notes of the Bank of Tennessee, when issued, circulate currently at par as the representative of money. If any person will take these notes, I will receive them in payment of taxes; and if thus taken, it will operate as a contract with the holder to that effect. When he takes them he accepts the offer I make. He assents to the terms contained in the proposition I make." We have then the parties, viz, the State and the

party who accepts the proposition, by taking the notes; the consideration, viz, the cause moving in making the proposition; the assent of the parties, without which, as it is said, there can be no legal contract, and the notes, the subject of the contract.

This taking of the notes was the act which made the particular person who took them a party. His rights under a contract, it is clear, for the first time then accrued. The notes issued by the bank, payable to bearer, were negotiable on delivery, and the bank was bound for all its lawful issues, and to redeem them from the holder upon presentation. The emission of the notes to parties receiving them, or the delivery by the holder to others who thus became the holder of the notes, made the contract complete between the bank and the holder. And as long as the 12th section of the charter of the Bank of Tennessee was in force, it is to be presumed that the issues of the bank were taken upon the faith of the promise of the State, contained in that section.

But can it be said, that after the 12th section was repealed, and the proposition in that section withdrawn, that a person taking the notes of the bank took them upon the faith of that promise. It cannot be doubted that the legislature had the right to repeal the 12th section, but it is said that the repeal of this section did not and could not affect the liability of the State to take any and all of the notes of the bank, issued prior to the repeal of the 12th section.

It is true, that in Woodruff *vs.* Trapnall, 10 Howard, 205, it was held by a majority of the court, that the 28th section of the charter of the State Bank of Arkansas, (very similar to the 12th section of the charter of the Bank of Tennessee,) was a continuing guaranty on the part of the State, that the notes should be received. That the notes were made payable to bearer and consequently, every *bona fide* holder had a right, under that section, to pay to the

State any debt he might owe it; that the State had a right to repeal said section, and the emissions of the bank subsequently, are without the guaranty; that the notes in circulation at the time of the repeal are not affected by it; and that it was sufficient, if Woodruff had the notes in his possession at the time he made the tender, *and they were issued by the bank before the repeal of the section;* and that into whose ever hands the notes of the bank might come, they carried with them the pledge of the State to receive them in payment of its debts.

But admitting all that can be claimed as having been decided in Woodruff *vs.* Trapnall, it does not follow that the State of Tennessee is bound to receive from the plaintiffs in error the issues of the Bank of Tennessee, tendered by them in payment of the amount due from them for exercising the privilege of selling goods in that State, at wholesale, and that the State, through its officers, should be compelled to issue to them a license to exercise such privilege.

The entire stock of the Bank of Tennessee did not belong to the State of Tennessee, nor did the State furnish the capital and receive the profits, as it was held was the case with the Bank of the State of Arkansas, the State of Tennessee being a mere trustee of a large portion of the five millions of dollars invested in the Bank of Tennessee as its capital. The stock was not owned by the State, the only stock issued or authorized to be issued being issued to the superintendant of public instruction, and really belonging to the children in the State of Tennessee, as *cestui's qui trust*. As to the sources from which the capital of the Bank of Tennessee was derived, and who were the owners thereof, the court is referred to the second and third sections of the act of the general assembly of the State of Tennessee, 1838, ch. cvii, page 153. It is true this act, by the 1st section, recites that a bank is hereby established in the name and for the benefit of the State, but the court, I in-

sist, cannot fail to see, upon a careful reading of the act, that the State of Tennessee, unlike the State of Arkansas, in relation to the State Bank of Arkansas, was not the sole owner of the bank. As it was held by the Supreme Court of Tennessee, 3 Coldwell, 448, "the common school fund, as well as the surplus revenue of the United States, under the act of Congress, approved June 23, 1836, and constituting a part of the capital of the bank, *were trust funds*, which the State held merely as a trustee, the surplus revenue was merely a deposit with the State, and for its safe keeping, and to the repayment thereof, from time to time, whenever required by the Secretary of the Treasury of the United States, the faith of the State was pledged."

This school fund, which the State held as trustee, was guarded and protected by a provision in the State constitution, article 11, section 10, of which trust, and the inviolability of the same, every note holder and creditor of the bank had notice. The Supreme Court of Tennessee also held (see 3 Coldwell, 449,) that "one of the prime objects of the charter, was to so provide that this trust fund should yield a profit, and to apply the same to the purposes of the trust. It cannot, therefore, be said the capital of the State belonged exclusively to the State, as did the capital of the bank of Arkansas, or that it received the profits thereof."

It is argued, that what is assumed to be a guaranty in the 12th section of the charter of the bank of Tennessee, is unaffected by the fact whether the State of Tennessee was or was not the sole owner of the bank of Tennessee, or whether the State did or did not receive the profits, but I have been particular in calling the attention of the court to the fact, that the State was not the sole owner of the bank; that the notes were not issued for the benefit of the State, and that it did not receive the dividends of the bank, because, as I shall insist, it takes the case out of the rule which was applied in the construction of the 28th section

of the charter of the State Bank of Arkansas, and because the ruling in Woodruff against Trapnall was upon the ground that the State of Arkansas was the owner of the bank of the State of Arkansas, as the following will show. In that case, the court say: "The entire stock of the bank is owned by the State. It furnishes the capital and receives the profits." Judge McLain, who delivered the opinion of the court in Woodruff against Trapnall, delivered the opinion in Paup *vs.* Drew, and in the latter case, says: In the case of Woodruff *vs.* Trapnall, decided at the present term, this court held that the 28th section of the charter constituted a contract between the State and the holder of the bills of the bank; that the pledge of the State to receive the notes of the bank in payment of debts was a standing guaranty, which embraced all the paper issued by the bank, until the guaranty was repealed, *and that this construction was founded upon the fact, that the bank belonged exclusively to the State, was conducted by its officers, and for its benefit.*

Assuming that this case is sufficiently unlike the case of Woodruff *vs.* Trapnall, and the later cases referring to and apparently adopting the ruling in Woodruff *vs.* Trapnall, to the effect that the section in the bank charter was a continuing guaranty, operating as a contract on the part of the State, to take any of the notes of the bank which were in circulation before and at the date of the repeal of the section, to take it out of the operation of that ruling, I call the attention of the court to the following passage fron Story, on the Constitution, in the chapter on "impairing contracts, section 1391." "It may be laid down as a general principle that whenever a law is in its own nature a contract, *and absolute rights have vested under it*, a repeal of that law cannot divest those rights or annihilate or impair the title so acquired."

And in the same section, just before, he says, "So a legislature may make a contract with individuals directly

by law, pledging the State to a performance of it; and then, *when it is accepted*, it is equally under the protection of the Constitution."

I call the attention of the court to the words I have italicised. It is evident the learned commentator in the first quotation I have made, must have meant that rights must actually vest under the contract before a party can set it up or enforce it; and in the second quotation, that acceptance of the proposition or guaranty made by the legislature, (I prefer to use the word proposition, because, until it is accepted, there is no contract,) it is under the protection of the Constitution, and that without such acceptance, it is not.

I also refer to Cooley's constitutional limitations, page 284, wherein that author says, "Citizens have no vested rights in the existing general laws of the State which can preclude their amendment or repeal, and there is no implied promise, on the part of the State, to protect its citizens against incidental injury occasioned by changes in the law.

Nevertheless, he adds, there may be laws which amount to propositions on the part of the State, which, *if accepted by individuals*, will become binding contracts. Of this class are perhaps to be considered bounty laws by which the State promises a gratuity to any person who will perform a particular act, supposed to be for the interest of the State. Unquestionably, the State may repeal such an act at any time; *but when the proposition has been accepted by the performance of the act before the law is repealed*, the contract would seem to be complete, and the promised gratuity a legal debt." (Citing 9 Mich., 327, 10 Cal., 189.)

Under these and other authorities that could be adduced, it would seem to be clear that as plaintiffs in error, in this case, did not act upon the proposition made by the State, in the 12th section of the charter of the Bank of

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Assuming that this case is sufficiently unlike the case of Woodruff *vs.* Trapnall, and the later cases referring to and apparently adopting the ruling in Woodruff *vs.* Trapnall, to the effect that the section in the bank charter was a continuing guaranty, operating as a contract on the part of the State, to take any of the notes of the bank which were in circulation before and at the date of the repeal of the section, to take it out of the operation of that ruling, I call the attention of the court to the following passage fron Story, on the Constitution, in the chapter on "impairing contracts, section 1391." "It may be laid down as a general principal that whenever a law is in its own nature a contract, *and absolute rights have vested under it*, a repeal of that law cannot divest those rights or annihilate or impair the title so acquired."

And in the same section, just before, he says, "So a legislature may make a contract with individuals directly

by law, pledging the State to a performance of it; and then, *when it is accepted*, it is equally under the protection of the Constitution."

I call the attention of the court to the words I have italicised. It is evident the learned commentator in the first quotation I have made, must have meant that rights must actually vest under the contract before a party can set it up or enforce it; and in the second quotation, that acceptance of the proposition or guaranty made by the legislature, (I prefer to use the word proposition, because, until it is accepted, there is no contract,) it is under the protection of the Constitution, and that without such acceptance, it is not.

I also refer to Cooley's constitutional limitations, page 284, wherein that author says, "Citizens have no vested rights in the existing general laws of the State which can preclude their amendment or repeal, and there is no implied promise, on the part of the State, to protect its citizens against incidental injury occasioned by changes in the law.

Nevertheless, he adds, there may be laws which amount to propositions on the part of the State, which, *if accepted by individuals*, will become binding contracts. Of this class are perhaps to be considered bounty laws by which the State promises a gratuity to any person who will perform a particular act, supposed to be for the interest of the State. Unquestionably, the State may repeal such an act at any time; *but when the proposition has been accepted by the performance of the act before the law is repealed*, the contract would seem to be complete, and the promised gratuity a legal debt." (Citing 9 Mich., 327, 10 Cal., 189.)

Under these and other authorities that could be adduced, it would seem to be clear that as plaintiffs in error, in this case, did not act upon the proposition made by the State, in the 12th section of the charter of the Bank of

Tennessee, until after that proposition was withdrawn—did not accept it—or have any rights vested under it, until the repeal of the section which amounted to a withdrawal of the proposition that they cannot be heard to set up a contract with the State.

2. The plaintiffs in error fail to show that the notes held and tendered by them to the defendant were the lawful issues of the Bank of Tennessee. They show that the notes "were issued by the bank, as provided for in the said 12th section of said charter," but it will be noticed that the section referred to, does not authorize the issue of the notes of the bank, and it cannot, therefore, be said that the notes tendered by plaintiffs in error were issued by the bank as *provided for* in said 12th section, for the 12th section made *no* provision for the issue of notes by the bank. That section simply refers to certain kinds of issues of the bank, and does not authorize the issue of that kind of notes, but provides that the bills or notes of said corporation, originally made payable, or which shall have become payable, in gold or silver coin, shall be receivable, &c.

The sections of the charter directing what kind of notes shall be issued by the bank, and how such notes shall be issued, are in the following words:

"Section 9, article 11. All bills, bonds and notes of the corporation, shall be signed by the president and countersigned by the cashier thereof, and the fund of the bank shall in nowise be held accountable therefor, unless the same shall be executed as aforesaid.

Article 12. The bills or notes which it shall be lawful for said corporation to issue and circulate, shall not be for a less denomination than five dollars, and after the 1st day of January, 1841, not less than ten dollars."

I submit, whether (other objections being out of the way) this court will compel the State of Tennessee to take the notes tendered by plaintiffs in error, unless they showed that such notes were the lawful issues of the Bank

of Tennessee. It may be that the same strictness is not required in this proceeding in describing these notes, as would be required in an action at law brought on them, but certainly the State would not be compelled to receive notes purporting to be the issues of the bank, unless they were the lawful issues of the bank; that is to say, issued in accordance with the provisions of the charter of the bank.

In order to bring this point more clearly to the notice of the court, I call the attention of the court to the act of the legislature of Tennessee, passed on the 16th February, 1866, entitled "an act to wind up and settle the business of the Bank of Tennessee," and which act was passed before the plaintiffs in error made the tender of the notes which they say were "the notes and issues of the Bank of Tennessee, issued prior to the 6th May, 1861," and of which they give no further description than that they "were issued by the Bank of Tennessee, as provided for in said 12th section, and payable to bearer."

By reference to this act, (16 February, 1866,) it will be seen that it was therein enacted that the Bank of Tennessee should no longer carry on the business of banking, should go into liquidation, that its assets should be taken charge of by a board of six directors, a trust assignment executed, conveying all the property and assets of the corporation to a trustee to secure the trust fund, and next, all the remaining just creditors of the bank of all kinds, which trust deed and trusts were, if deemed necessary, to be executed by filing a bill in the Chancery Court at Nashville.

By the 2nd section of the act, the directors appointed under that act were instructed to receive, in payment of all debts due the bank, United States currency or the notes of the bank, which were issued prior to the 6th May, 1861, and to studiously refuse and exclude all issues *or reissues* after that date, also, all issues signed by G. C. For-

bett; also, all *re-issues* made after the 6th May, 1861,* by G. C. Forbett, or any of the officers, of the principal bank or any of its branches, as utterly void.

See acts of Tenn., 1865-6, p. 37.

So it is evident from this act, that notes of the bank, *although dated prior to 6th May*, 1861, *were re-issued after that date*, and this provision in the 2nd section of the act of 16th February, 1866, taken in connexion with section 6 of the schedule to the amended constitution of the State, made it the more necessary and proper that plaintiffs in error, who nowhere allege that they became the holders of the notes tendered by them prior to the 6th May, 1861, should have shown, in order to fix the liability of the State to take them in payment of taxes, if any such liability existed, that the notes tendered were the lawful issues of the Bank of Tennessee, more especially as the tender was made after the adoption of the constitution of 1865, and after the passage of the said act of February, 1866.

The said 6th section of the schedule to the amendment to the State constitution is as follows:

"All laws, ordinances and resolutions of the usurped State government, passed on or after the 6th May, 1861, providing for the issuance of State bonds; also all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th May, 1861, and all debts created or contracted in the name of the State by said authority, are unconstitutional, null and void; and no legislature shall hereafter have power to pass any acts authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

The general allegation in the petition for mandamus, that the notes tendered were issued prior to the 6th May, 1861, was not sufficient, because they may have been *reissued* after the 6th May, 1861, and this the very class of the issues

* The date of the Ordinance of Secession.

of the bank, the people of the State, assembled in convention to amend the constitution of the State, had declared were null and void, and it was this class of paper of the bank the legislation of the 16th February, 1866, under that high authority, had directed should be excluded as illegally re-issued; and it was for this, among other reasons, the Supreme Court of Tennessee held, (see printed record, page 35-6,) "that to entitle a party to pay his taxes in the notes of the Bank of Tennessee, they must have been lawfully issued."

The plaintiff in error, Francis Furman, in August, 1865, took out a license as a wholesale merchant, granting him the privilege of selling goods for one year from that date. Under the provisions of the laws of Tennessee, (code, section 679,) he bound himself to the State to render to the clerk, at the end of twelve months from the date of his bond, a sworn statement of the invoice cost of all goods which he or his assigns should bring to his establishment for sale, within the said twelve months, and pay the tax upon such goods. This license, therefore, was taken out after the repeal of the12th section of the bank charter, and with notice of its repeal, the indebtedness of Furman to the State or the tax on the goods brought into his establishment from August, 1865, to August, 1866, accrued during that period, and after the repeal of the said 12th section, and Furman, the plaintiff in error, tendered the bank notes, of course, after the repeal, and after notice of the repeal, and after the passage of the act before referred to, passed on the 16th of February, 1866, to wind up the Bank of Tennessee; and, notwithstanding the people, in convention assembled to amend the constitution of the State, had expressly repudiated certain of the issues of the Bank of Tennessee, issued and *re-issued* in violation of the charter, and for an illegal purpose; and notwithstanding said act of 1866 had pointed out to plaintiffs in error, and all others, all issues and *re-issues* after the 6th May, 1861, and all is-

sues signed by G. C. Forbett; also, all *re-issues* made after the 6th May, 1861, by G. C. Forbett, or any of the officers of the principal bank or branches, as utterly void, yet the plaintiffs in error fail to state, or to show by the production of the notes, or by a list thereof, filed with their petition, that the notes tendered by them were the *bona fide* issues of the bank or that they were the *bona fide* holders of the lawful issues of the bank.

They must have known that there were millions of issues, porporting to be issues of the bank, which, though dated prior to May 1, 1861, and signed by G. C. Forbett, as president, were never, in fact, put into circulation until long after the 6th May, 1861, when the bank started on its "march to the sea," stopping at Chattanooga, Atlanta and Marietta, and issuing, in aid of the rebel Confederacy, millions of notes, every dollar of which every one taking them knew would, like the Confederate issues, be worthless unless the confederacy was a success.

Why, in the preparation of the petition for a writ of mandamus, in a case so important, was the fact that the notes tendered were the lawful issues of the Bank of Tennessee, not stated? Nay, why was it avoided and sought to be evaded, by the statement that the plaintiffs in error tendered notes of the bank issued in pursuance to the provisions of the 12th section of the act of 1838? The 12th section did not, as I have shown, provide for the issues of any notes. It referred to a certain kind of notes of the bank, as "bills or notes of said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin."

Now, all the bills or notes of the bank, except those mentioned in section 10 of the bank charter, made negotiable by assignment, were payable on demand in gold or silver coin. Notes of the bank on hand, dated before May 1, 1861, were *re-issued* by Forbett, who happened to be president of the bank on the 6th May, 1861, the date of

the ordinance of secession, and were no doubt just such notes as are described or rather alluded to, in the 12th section, *i. e.*, payable on demand in gold or silver coin. The Supreme Court of Tennessee, having the facts in relation to the illegal issues of the bank before it, on page 30 of the printed transcript of the record in this case, say:

"The bank was organized and went into operation under the provisions of its charter, issued its bills or notes, which were put into circulation as money, and passed currently at par value, and were faithfully and promptly received by the State in payment of all moneys due it, until the disastrous period in the history of the country, when the bank and its assets were seized by persons engaged in a hostile armed rebellion against the lawful authorities of the government of the United States, who, without authority of law, and for the purpose of aiding the rebellion, removed the same beyond the limits of the State."

That court, as I insist, very properly held that to entitle a party to pay his taxes in the notes of the bank, they must have been lawfully issued * * . They also held that the petition should have averred that the notes tendered by Furman had been lawfully issued, in other words, that they were the legitimate issues of the bank. This was not done.

If the State was bound, under the 12th section, to take notes of the Bank of Tennessee for taxes, it was not bound to take them unless they were *bona fide* issues of the bank, that is to say, the legitimate issues of the bank.

Was it not incumbent on plaintiffs in error to state, in a petition which was brought by them to compel the State to take them under an alleged guaranty, to show that they were the *bona fide* issues of the bank, especially as they were tendered after the repeal of the 12th section, and after the act of February 16, 1866, placing the bank in liquidation, and declaring to be null and void the immense amount of its notes re-issued by its faithless officers?

3. The plaintiffs in error are not entitled to set up and enforce any contract with the State *under the circumstances*, because the State under its general police power had a right, by repealing the 12th section of the bank charter, to say that it would no longer be liable to take the notes of the Bank of Tennessee in payment of its revenue or debts due to it.

The subject of the police power of the States has often been considered in its bearings upon the clause of the Constitution of the United States, which forbids the passage of laws by the States violating the obligation of contracts, and it has been invariably held that this clause does not so far remove from State control the rights which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is held, are subject to this power, and regulations which affect them may not only be established by the States, but must also be subject to change from time to time with reference to the general well being of the community, as circumstances, change or as experience demonstrates the necessity.

Cooley's Constitutional Law, 574.

Thorpe *vs.* Rutland and Burlington R. R. Co., 27 Vt., 140.

The chief justice, in Dartmouth College *vs.* Woodward, 4 Wheat., 629, uses the following language, which is cited as pertinent to the general question of what laws are prohibited upon the ground of impairing the obligation of contracts. "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and the instrument they have given us is not to be so construed."

If the application of the plaintiff in error to compel the State of Tennessee to issue them a license and take the issues of the Bank of Tennessee, under the circumstances, will operate to restrain the State from carrying on the government thereof, or to make regulations for the good government of the State, and the protection of the rights of individuals, the rights of the plaintiffs in error, which depend for their execution or enforcement upon contract, would not be removed from the control of the State.

I do not expect to be able to show that if the State were to be compelled to take the issues of the Bank of Tennessee for its revenues and taxes to support the government, that it would result in the destruction or suspension of the operations of the State government, although I believe it would seriously embarrass the State, but I do insist that under the power which resides in the State over contracts and its whole internal government and affairs, that parties taking notes of the Bank of Tennessee after the act for winding up the Bank of Tennessee, passed 16th February, 1866, are governed by the provisions of that act, with respect to the remedy on any contract with them as holders of the notes of the bank, and before they can compel the State (if at all) to take the notes for taxes must present them to the principal or maker under the provisions of that law.

The following conclusions would seem to be justified upon an examination of the charter of the bank and the record in this cause, and the legislation referred to:

First. The corporation known as the Bank of Tennessee, was chartered to provide a means by which the large sum of money constituting the school fund, held by the State, in trust for the children in the State, for all time to come, should be invested, secured, and made to yield an interest or income for the advancement of education in the State, next for the purpose of promoting the internal improvement interest, and lastly, to provide a fiscal agent for the State.

Second. That as an efficient mode of securing these ends, the legislature authorized the bank to issue notes or bills negotiable by assignment, and notes or bills payable to bearer, negotiable by delivery, and in order to give them currency and make them circulate as money at par, made provision in the 12th section of the charter that the bills or notes originally payable, or thereafter made payable, in gold or silver coin, should be receivable at the treasury, and for all taxes and dues to the State, intending thereby that parties who took any of such notes of the bank while the guarranty in the 12th section was in force, should be protected by it and be entitled to its benefits.

Third. That the bank was in operation and received the notes, such as are referred to in payment of taxes, and the legislature passed no law varying, or seeking to vary the terms of the 12th section of the act of 1838, until the year 1858, when the Code of Tennessee was adopted, when a general law was passed enacting what collector of taxes should receive in payment of taxes due the State; among other things, providing that they should receive bank notes at par, which would, to say the least of it, operate as a direction to tax collectors not to receive the notes of the Bank of Tennessee if they were not at par.

Fourth. That as shown by the statement ~~on~~ the opinion of the Supreme Court of Tennessee in this cause, the Bank of Tennessee was taken charge of and its assets carried south in the rebellion, and although its charter was not repealed, that its business was destroyed and its assets squandered and applied to the purposes of the rebellion, and that as is shown in the ordinance of secession and military league with the Confederacy, adopted in 1861, the legislature of Tennessee (so called,) authorized the issue of five millions of dollars of the notes of the bank to organize an army for the purpose of levying war against the United States and for organizing and equipping an army for that treasonable purpose.

Fifth. That when the people of Tennessee came to re-organize the State government under the authority of the national government, they expressly provided in section 6 of the schedule to the amended constitution, that these illegal bank issues were null and void, and that the legislature should pass no law providing for their payment.

Sixth. That the legislature, under the re-organized State government, in view of the fact that the State Bank had ceased to be the fiscal agent of the State, had had the trust fund constituting the greater part of its capital, destroyed by its faithless officers, and had failed in relation to all the purposes of its creation, passed the act of 1865, expressly repealing the 12th section of the charter so as to give notice that the proposition was withdrawn and that the State would no longer take the accumulated millions of the issues of the bank in payment for taxes due the State.

Seventh. That when the new State government came to look into the question of its finances, and board the wreck and see what was preserved from the tempest, and the depredations of a piratical crew, it passed the law mentioned in the plaintiff's petition as unconstitutional, to wit: the act of the general assembly of the State of Tennessee, entitled an act to wind up the Bank of Tennessee, found in the acts of Tennessee, page 37, which for convenient reference, I here insert in full, viz:

CHAPTER XXVIII.

AN ACT to wind up and settle the business of the Bank of Tennessee.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Bank of Tennessee shall no longer carry on or do banking business, and shall be, and is hereby placed in liquidation, and its business and affairs shall be settled at as early a day as practicable; and for this purpose and end, the governor of the State shall nominate to the senate, for its confirmation, six directors, who, when confirmed, shall be qualified, and shall elect from

their number a president, and take charge and custody of said bank, and all its assets, property, books and papers of every kind; shall have power to appoint a cashier and other such officers, agents and attorneys as are necessary and proper; prescribe and pay such salaries for the president, cashier and other officers and agents as may be reasonable, under the supervision and with the consent and approval of the governor; take bond and security from said officers in such sums as shall be proper for the faithful performance of their duties, and shall have power to do any other acts necessary and proper to accomplish the object of this act.

SEC. 2. That the president and directors aforesaid, may have possession of the banking house at Nashville as a place of business, and for the purpose of keeping safely the assets, books, papers, and property of said bank including the branches, and shall make out and file with the Governor, a complete schedule of all the assets, and of all debts due to or by said bank and branches, and of all property of said bank and branches, of every kind. That said president and directors take steps and proceed with all despatch in the collection of the debts due to said bank and branches, and receive in payment the United States currency or notes of the said Bank of Tennessee, which were issued prior to the 6th day of May, 1861, and studiously refusing and excluding all issues or re-issues after that dote; also all issues signed by G. C. Torbett; also, all re-issues made after the 6th day of May. 1861, by G. C. Torbett, or any of the officers of the principal bank, or any of its branches, as utterly void. All notes of the Bank of Tennessee which shall come into their possession shall be cancelled with a hammer, and filed away and kept for inspection.

SEC. 3. That all property found among the assets, and property of the bank belonging to other persons—such as special deposits of jewelry, bonds, notes and packages of papers of value, when the same has value of pecuniary nature, may, on full and satisfactory proof of the ownership thereof, be delivered over to such owner, provided said owner is not indebted to the bank, or on payment of all demands and claims due said bank. In each case, such applicant and claimant shall file an affidavit, describing his property and making oath that he is not indebted to said bank, and if proper in the judgment of the president

and cashier, shall give bond of indemnity with security; and a list of such property, with names of the owners, shall be made, and also filed with the governor.

SEC. 4. That the funds now in the custody of the Governor, Secretary of State and Comptroller, in the form of, and known as the United States seven-thirty bonds or securities invested under an act of the general assembly, and amounting to the sum of six hundred and eighteen thousand two hundred and fifty dollars, with all the interest thereon accrued and accruing, and declared as a part of the perpetual school fund by an act of this general assembly, shall continue to be held as common school fund, and shall never be diminished as provided for in chapter 11, section 10, of the constitution of the State of Tennessee.

SEC. 5. That the President and directors, without delay, and at as early a day as practicable, cause an assignment and deeds of trust of all the assets of said bank and branches, and property of all kinds, real, personal and mixed, including the funds above described, $618,250, and all interest thereof accrued or accruing, to be made and executed in the name and behalf of the Bank of Tennessee and under its seal, for the uses and in trust as follows: First to secure the full sum of $1,500,000, the amount of the common school fund deposited in the Bank of Tennessee by acts of the legislature, which shall be a preferred claim with interest accrued and accruing on said sum of $1,500,000 since 6th day of May, 1861, which sum of $618,250, United States 7-30 bonds, shall be retained and placed in the hands of the Treasurer of the State of Tennessee, as a part of the said common school fund originally deposited in the Bank of Tennessee. Secondly, that after said school funds as above named, with interest accrued or accruing thereon, since May 6th, 1861, has been fully secured to the State as intended by this act, the remainder of all assets, real, personal, or mixed, shall be assigned for distribution, *pro rata*, to make, hold and secure all remaining just creditors of all kinds, excluding all claims and demands of all kinds, of date after 6th of May, 1861, as absolutely null and void. That the real estate be sold, on a credit of one, two and three years, with interest from date, retaining a lien bond, and approved security being required, and to be paid in United States Treasury notes or their equivalent.

SEC. 6. That the Attorney General of the State, if it

become necessary in the opinion and judgment of the governor, file a bill in the Chancery Court, to execute the deed of trust, and trusts, and without security enjoin all creditors from sueing said bank, and making all the creditors as far as known, and all others unknown, by publication in some public print in the city of Nashville, parties, and to all others, to the end that all interested therein may come in under one decree, and equal justice be done to all.

SEC. 7. That the President and Directors give notice in some two or more of the public prints in the city of Nashville—to all to whom it may concern, and to all persons to whom the money or fund of said Bank of Tennessee was illegally paid, that is for service rendered as officers thereof, after the 6th day of May, 1861, or for service rendered in aid of the rebellion, civil or military, or for property of any kind in aid of the rebellion, or for property of any kind, or on contract for articles of any kind, furnished, or to be furnished, for the benefit of the rebel authorities of the State of Tennessee, or the so-called Confederacy, or on any other illegal contract, or purpose; and if the said moneys so paid out of the Bank of Tennessee, or any of its branches, be not refunded, and returned within said thirty days, the said president and directors shall cause suit or suits to be brought against all persons who so received money from the Bank of Tennessee, or any of its branches, and prosecute the same to judgment, requiring of its attorneys the greatest diligence in that behalf.

SEC. 8. That the President and Directors hold their office for two years, and until their successors are appointed, and make report of the state and condition of the bank to the legislature; and this act to take effect from and after its passage.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
JOSHUA B. FRIERSON.
Speaker of the Senate.

Passed February 16th, 1866.

Eighth. That the whole scope, object and purpose of said act of 16th of February, 1866, was to put the bank in liquidation, wind it up through a special board of directors appointed for that purpose, to provide by law for excluding as void, the issues of the bank after the 6th May,

1861, and the issues dated before the 6th May, 1861, but which were *re-issued*, to prefer in the trust deed therein provided to be made the beneficiaries of the school fnnd, or what remained of the school fund, and have the notes redeemed out of the assets of the bank outside of the trust fund which constituted a part of the capital of the bank, and if necessary to have the trust closed under the orders of a court of equity.

Ninth. That plaintiffs in error had notice of the passage of the act of 1865, repealing the 12th section of the bank charter, the act of 16 February, 1866, to wind up the Bank of Tennessee, of the fact that the convention of 1865 had treated certain issues of the bank as illegal and void, of the fact (recited in a public act of the legislature) that notes of the bank, although they may have been in circulation before the ordinance of secession, (6th May, 1861,) *were re-issued and were in circulation after the 6th May*, 1861, and with knowledge of all this, and after the acts above named had passed and the facts above named had transpired and come to their knowledge, they incur an obligation to the State of Tennessee, (see their bond in the record page) and in August, 1866, and tender in payment of the amount due from them to the State the depreciated paper of the Bank of Tennessee, described by them simply as issued prior to the 6th May, 1861, and issued under the provisions of the 12th section of the bank charter.

Tenth. That they fail to comply with the provisions of sub-sections 1 and 2 of section 703, of the code of Tennessee, (as is more fully shown in my argument on the motion to dismiss the writ of error in this cause, page , to which I beg to call the attention of the court,) *and notwithstanding they have failed to show a compliance with the provisions of the law to entitle them to a license as wholesale merchants*, they bring a petition for mandamus to compel an officer of the State to issue to them such license.

Now, it is submitted to the court whether plaintiffs in

error like the defaulting treasurer in Woodruff *vs.* Trapnall, whose debt to the State had accrued before the repeal of the 28th section of the charter of the Bank of the State of Arkansas, a bank owned exclusively by the State of Arkansas, can compel the State of Tennessee to take the notes of the Bank of Tennessee for a debt to the State, incurred after the repeal of the 12th section, and after the passage of the act to wind up the Bank of Tennessee, tendered by them after the passage of both of said acts, especially when they fail to show in relation to the notes tendered that they were the lawful issues of the bank, or in relation to the license that they had complied with all the provisions of the law to entitle them to such license.

Will the court hold that the 12th section of the charter of the Bank of Tennessee was a guaranty—a continuing guaranty on the part of the State to take all the notes of the Bank of Tennessee in payment for taxes to the full extent of the whole amount of the issues of the bank, and with that guaranty unaffected by a repeal of the charter and unaffected by the action on the part of the officers of the bank which swelled its volume of circulation, issued for illegal purposes, to an amount that would cripple the State to the extent of stopping the operations of the State government, or make it powerless to regulate its civil institutions or to provide for the good government of the State?

Will the court hold that the State had no power to pass the act of 16 February, 1866, and under the circumstances, even in the case of a bona fide holder of the legal issues of the bank, issued in pursuance of the charter and prior to the repeal of the 12th section of the bank charter to change the remedy of the note holder (so as it does not destroy the right of the note holder,) and compel him to present the note to the special board of directors appointed under that act for payment, or to the trustee, or the court

under that act and show what kind of notes he held, before compelling the State to take these notes? I need not quote authorities to show that it is competent for the State to change the remedy under a contract. These authorities or decisions are numerous and are familirr to the court.

How much stronger is the reason under the general police power of the State, why the State should be held to have a right to direct the winding up of the bank, the presentation of the notes of the corporation issuing them, to the bank or its officers or trustee designated by the State for that purpose, before presenting them to the guarantor, especially after the repeal of the 12th section and the notice which the holders had of the fact that many of these notes of the bank were *re-issues* and illegal, and especially when the officers of the bank charged with winding up the institution, and acquainted with the business transactions of the bank, the amount and character of its issues are presumed to be best able to detect the illegal issues and distinguish them from its legal issues.

HORACE H. HARRISON,
For Defendant in Error.

Washington, D. C., March 1st, 1869.

Supreme Court of the United States.

FURMAN, GREEN, & CO.,

vs.

P. L. NICHOL, *Clerk.*

BRIEF FOR DEFENDANT.

This is an application to compel the granting to plaintiffs of a license to deal as wholesale merchants, in the city of Nashville, for the year ensuing the 1st of August, 1866. By the laws of Tennessee, this is a privilege denied to the citizen, and grantable to him only upon application and compliance with certain precedent conditions. In this case the license was refused by defendant, who, as clerk of the county court of Davidson county, was the officer charged under the law with that business.

Plaintiffs applied by petition to the circuit court of the State for a writ of mandamus, to compel the granting of the license. Defendant, appearing in answer to a writ *nisi*, demurred to the petition. The demurrer was overruled, and the writ made peremptory. Defendant appealed to the supreme court of the State, by which the demurrer was sustained and the petition dismissed.

A writ of error from this court is prosecuted, under the 25th section of the judiciary act, on the ground that the proceeding violates the Constitution of United States, by impairing the obligation of a contract.

I. Is the case so presented as to give the court jurisdiction?

In January, 1838, the Legislature of the State established a bank, for internal improvement purposes and to aid in the

establishment of a school system, to be known as "The Bank of Tennessee."

The capital was the "school fund" of the State, the "surplus revenue," and other moneys held, &c., &c.

As officers to manage its affairs, the Governor was to nominate to the General Assembly, for confirmation or rejection, twelve directors to serve for two years, declared to be a body politic and corporate, the *ens legis* of the institution.

The bank went into operation with affiliated branches in different parts of the State, and was employed largely in various ways as the fiscal agent of the government.

From the character of its organization, it necessarily became a political machine, and at the outbreak of the rebellion it was used lavishly and without stint by the leaders of the movement, who had it entirely in their hands.

They issued its paper to such an extent that no investigation, so far as I am aware, has ever been able to ascertain the amount. At the approach of the flag the officers fled, carrying with them all the assets, except real estate and some uncollected debts. They advanced millions to the rebel State authorities, taking bonds of the State in exchange. The coin was used when needed to pay the fugitive State officials. In a word, the bank was ruined, and its issues, held by the people, who had taken them for a full consideration at their nominal value, became almost worthless, and for a trifle fell into the hands of a class of dealers who hold them as a speculation, in the hope of compelling the same people, the tax-payers of the State, to redeem them. Thus, in addition to the loss already sustained by their depreciation, they will be compelled to lose their entire nominal amount—a sum greater probably than all the revenues of the State since its foundation. A question of "immense magnitude" truly.

With a general knowledge only of these things, the people, in reorganizing the State government, in February, 1865, declared, in their amended constitution, that "all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th day of May, 1861," were null and void, and that "no

Legislature shall hereafter have power to pass any act providing for the redemption of said notes."

But the 12th section of the act of 1838 had provided "that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax collectors and other public officers, in all payments for taxes, or other moneys due the State;" and it was supposed that the issues prior to May 6, 1861, were on a different footing from those issued subsequent to that date.

When the restored government was organized at the meeting of the General Assembly, on the 3d of April, 1865, the revenues of the State demanded the promptest attention. One of the earliest acts was a revisal of the revenue laws, requiring, among other things, the licensed merchant to pay two per cent. on the amount of sales. Then, on the 10th of June, 1865, an act was passed repealing the 12th section of the bank act of January, 1838; and on the 16th of February, 1866, another act passed, winding up the bank and placing it in liquidation.

Plaintiff Furman alleges, that on the 28th of August, 1865, and after the repealing act of June, 1865, he had obtained a license to deal as a wholesale merchant in the city of Nashville for one year, giving bond that at the end of the year he would pay the sum accruing for the privilege, and "otherwise comply *in all things* with the revenue laws of the State." This is a voluntary obligation by the plaintiff, and by its very terms the revenue laws of the State enter into it and form a part of it. What these laws are we have seen.

Before the expiration of the year he thought proper to admit a partner to his business, and applied to defendant for a new license. This was refused, unless he would comply with his previous undertaking to the satisfaction of defendant. It seems that upon the former license there was due the State the sum of $3,534 58, which sum plaintiff tendered in the notes of the Bank of Tennessee issued prior to May 6, 1861; but which defendant refused, "because the same were not at

par," and refused to issue the license unless the amount due was paid in "par funds."

It will be observed that plaintiffs do not claim to have been the *bona fide* holders of said bills, and not, as it is most probable, the convenient friends of some speculator, to aid him, by a purely colorable transaction, in bringing his worthless paper to the attention of the courts. Nor does he claim to have held them prior to May 6, 1861, or even to June 10, 1865, or to February 16, 1866.

It will be further observed, that though it was asserted in the petition not to be "in the power of the Legislature of the State of Tennessee to impair or annul the validity and binding force" of the contract, alleged to be contained in the bank charter, yet no act of the Legislature is complained of, except the act of February 16, 1866, winding up the bank. This is alleged to be unconstitutional (whether violative of the State or United States Constitution is not stated) and void, because it diverts a trust fund from the purposes of the trust. And it is not alleged that the refusal to issue the license was based upon any provision of this act.

The demurrer, under the practice in Tennessee, is a general one, and puts in issue every question upon the petition, as well as those specially enumerated. The sustaining of the demurrer by the court determines the insufficiency of the petition, but without stating the grounds of the decision.

In this state of the record, can this court take jurisdiction of the case. The validity of no statute is drawn in question by either party, nor was it decided by the court. If we go beyond the record, examine the opinion, regardless of the recent decision of this court in Rector *vs.* Ashley, (6 Wallace, 148,) we find that no such question was considered. The act of February 16, 1866, mentioned, and the only one complained of in the petition, is not even alluded to. The case went off entirely upon the *construction* given to our several statutes.

When the construction alone, and not the validity of a State statute is involved in the decision of the State court, it has been repeatedly held, that no jurisdiction is given to this

court by the 25th section of the act of 1789. (McBride *vs.* Hoey, 11 Peters, 167; Com. Bank of Cincinnati *vs.* Buckingham's Exrs., 5 Howard, 317; Lawler *vs.* Walker, (14 How., 149.)

We may say, as the court say in 5 How., 342: "If this court were to assume jurisdiction of this case, it is evident that the question submitted for decision would be, not whether the statutes of Tennessee are repugnant to the Constitution of the United States, but whether the supreme court of that State has erred in its construction of them. It is the peculiar province and privilege of the State courts to construe their own statutes, and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them, on the pretence that their judgments have impaired the obligation of contracts."

The case of Bridge Proprietors *vs.* Hoboken Co., (1 Wallace, 116,) does not affect the present case. That was a bill in equity, to restrain the building of a bridge across the Hackensack river. It was alleged that complainants had a contract with the State of New Jersey that no such work should be allowed, and that in violation of the contract the Legislature of the State had passed an act in 1860, under which such a structure was authorized. The defence was, 1st, a denial of the contract; and, 2d, a denial that its obligation was impaired by the act of 1860. The court of New Jersey sustained the validity of the act and dimissed the bill. This court held, that for the purposes of jurisdiction it was clear enough from the record that the validity of the act of 1860 had been drawn in question as repugnant to the Constitution of the United States, and its validity sustained. In this case, on the contrary, the validity of no statute is put in issue or drawn in question; and consequently the validity of none sustained, as against an objection that it infringed the Constitution of the United States.

II. Were the case properly here, and within the jurisdiction of this court, is there error in the judgment of the supreme

court of Tennessee in sustaining the demurrer and dismissing the petition?

The case of Woodruff *vs.* Trapnall, (10 How., 190,) is relied on by plaintiffs to sustain their case.

If it were deemed necessary, in the state of the record, we should ask the court to review the decision in that case, and the more readily as the supreme court of Arkansas was overruled by but a majority of this court. We should ask a reëxamination of the propositions presented by the dissenting minority, pp. 216, 217. We should insist that the taxing power of the State could not be irremediably destroyed and annulled by a legislature assuming to obligate the State to receive anything but money in payment of its revenues, or that one legislature could thus bind the State irrevocably and beyond the repealing power of all subsequent legislatures; that the treasury could not thus be helplessly committed to what might prove as worthless as John Law's issues, South Sea certificates, or confederate paper; that the taxing power, unlimited and unrestrained, was vital, and could not be traded away; that dishonest and unfaithful officials could not be empowered to bind the people of the State, as would be the case in this instance, to the intolerable burden of redeeming multiplied millions of their promises, leaving the Government, meanwhile, with no available source of revenue.

That case, however, differs in several essential particulars from this. The Bank of the State of Arkansas was merely a money-making enterprise of the State. The capital was borrowed upon the credit of the State, and all dividends declared to belong to the State; a general fund in the treasury, subject to the control and disposal of the Legislature. In this case the capital consisted of certain trust funds, in the keeping of the State, augmented by funds to be raised on the faith of the State, "sufficient to make the whole capital five millions of dollars." The dividends were to be applied to common schools and academies, and its operations conducted in aid of internal improvements. It was a sacred fund, set apart by the constitution of the State, and invested in this

way by public-spirited men, so as to be profitable for the purposes of the trust. The bank was used as a financial agent and public depository in promotion of the general objects of the trust. The provision of the 12th section was merely a financial regulation to govern the revenue officers of the State.

But it is supposed that the first section does more, that it pledges and so binds the State for ultimate payment of all the liabilities of the bank. That section is as follows:

"*Be it enacted, &c.*, That a bank shall be and is hereby established, in the name and for the benefit of the State, to be known under the name and style of 'The Bank of Tennessee,' and the funds and credit of the State are hereby pledged for the support of the said bank, and to supply any deficiency in the funds hereinafter specially pledged, and to give indemnity for all losses arising from such deficiency."

If the construction contended for by the plaintiffs be the correct one, then the issues of the bank were simply bills of credit, within the meaning and prohibition of the Constitution of the United States. Designed to circulate as money, issued "in the name" of the State, "for the benefit" of the State, on "the faith and credit of the State," by the officers of the State, and to be redeemed by the State; they would be as truly and actually the undertakings of the State as if they had borne on the face the words "The State of Tennessee" instead of "The Bank of Tennessee," and been signed by the comptroller and treasurer, instead of the president and cashier. These are the indicia of bills of credit, as defined by this court in Craig *vs.* The State of Missouri, (4 Peters, 410,) and Briscoe *vs.* The Bank of the Commonwealth of Kentucky, (11 Peters, 311:) "paper which circulates on the credit of the State, and is so received and used in the ordinary business of life." Passing beyond form to substance, it makes no difference whether the State issues the paper from its "bank" or its "treasury."

Such, however, was certainly not the intention of the framers of the law, and such is not the fair construction of it.

The State government had in charge a trust fund deposited in different banks, vested in stocks, in the hands of certain officials and loaned to private individuals; much of it unpro-

ductive, and all of it insecure. For the benefit of a safe and profitable execution of the trust, the bank was established, and the pledge of the State given to make good any deficiency in the trust funds to comprise its capital, arising from loss or failure to collect it from the various points at which it was then distributed. It was a public institution for the administration of a great public trust, properly a trust bank, deriving its faith and credit in the business transactions of the community from its capital and presumed good management, and not from the taxing-power of the government. The act creating it is held by the courts of Tennessee to be a public, general law. It is not an act of incorporation, limited, as that term is usually understood, to private corporations. The Legislature could at any time modify or repeal the act or any of its provisions. This appears from the general character of it, and especially in the language of the 8th section, (page 13, record,) limiting a provision to thirty years, "or not so long, if the bank should not continue so long in operation;" the Legislature alone having the power to determine that question. And that they might exercise it providently is the true purpose of the machinery devised in the latter part of the act from section 11 forward.

The character and purpose of the 12th section has already been indicated;—a financial regulation directoryto the revenue officers and an authority to them, protecting them from liability should they receive the paper and loss ensue; not a contract with the holders of the bank paper, superadded to such contract as the officers of the bank might think proper to make and express in language upon the paper itself.

The first act modifying this section bears date May, 1858, and forms section 603 of the Code of Tennessee, providing that the collector of the public revenue shall receive, in addition to federal money, comptrollers' warrants and wildcat certificates, "such bank notes as are current and passing at par in this State." In the Arkansas case, the operative words of the repeal act were "from and after the 4th of March, 1845, nothing shall be received in payment of taxes or revenue due the State but *par funds*." By a familiar principle

of legal hermeneutics, the operative effect of the two acts is the same: to forbid the receiving of the notes of the respective banks by the revenue collectors, whenever they should cease to be *at par*.

Here, in the view we have taken of the case, the defence might rest.

Upon the theory of the court in Woodruff *vs.* Trapnall, (10 How., 206,) that the provision making the notes of the bank receivable for the debts of the State is a continuing guarantee by the State that the notes shall be so received, it is held that the State had the right to repeal the provision, and that "the emissions of the bank subsequently are without the guarantee." Applying the doctrine to this case, all the issues of the bank subsequent to May, 1858, are without the guarantee of receivability, supposed to attach by virtue of the 12th section. And as plaintiffs do not allege a tender of notes issued prior to that date, they have not brought themselves within the provisions of that section, and are not entitled to any benefit under it.

III. But there is another radical distinction between this case and that from Arkansas. The "debt" in that case was a judgment against a public officer and his securities for a default occurring before the repeal of that part of the bank charter making its notes receivable in payment of debts, and enforced only at the end of a protracted suit.

In this case the obligation was voluntarily contracted, after the act of May, 1858, and the still more specific repealing act of June 10, 1865, by a party seeking a privilege from the State, and executing his bond "in all things to comply with the revenue laws of said State."

The case of Paup *vs.* Drew, (10 How., 218,) was a case similar in some respects to Woodruff *vs.* Trapnall, and was argued and decided with it. The "debt" in that case was a bond to the State of Arkansas to pay certain sums "in specie, or its equivalent." The court held that the State was not bound to receive the bank issues in payment, although the debt had been, like that in Wooodruff *vs.* Trapnall, reduced to a judgment. They say, "if by a contract the State was bound to

receive the notes of the bank in payment of its debts, by a contract this obligation might be waived; and no waiver could be more express than an obligation by the debtor to pay in specie, or its equivalent." (10 How., 223.) The case of Trigg *vs.* Drew (10 How., 224) received a similar decision. These two cases, it is believed, are decisive of the present.

But plaintiffs insist that they are parties to a violated contract. Supposing the twelfth section, while in force, to have been tantamount to a contract of guarantee on the part of the State: it was such contract only with the *bona fide* holders of the notes. They do not claim to be such, or to have owned or held any of the notes tendered at the date of the repeal. After that time they took them with full notice that the guarantee had been withdrawn; and there is, therefore, no contract with them, of whose violation they at least can complain.

In the Arkansas case, it was agreed that "said bank continues to exist with all its corporate functions." (10 How., 192.) A similar averment is made in this petition, but is subsequently contradicted by a reference to the act of February 16, 1866, to wind it up and settle its business.

Therefore it appears:

1. Plaintiffs do not show a contract made with them by the State.

2. They have, by their voluntary undertaking, waived the obligation of such contract as they claim.

It follows that the question of an impaired obligation does not and cannot arise upon this record.

HORACE MAYNARD.